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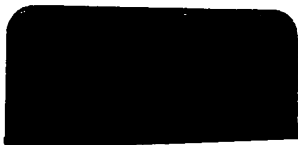
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THE
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CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. LXXV.

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AMERICAN STATE REPORTS.

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CASES
IN THE
SUPREME COURT
OF
GEORGIA.

SAILORS v. STATE.

[108 GEORGIA, 35.]

CRIMINAL LAW—DISORDERLY CONDUCT.—Where a man and woman in an intoxicated condition are riding on a street-car, using profane language and hugging and kissing each other, there being other females on the car, this is indecent and disorderly conduct in the presence of females, though the female passengers may not have seen or heard such conduct.

Fred. T. Saussy and Gordon Saussy, for the plaintiff in error.

W. W. Osborne, solicitor general, for the defendant in error.

35 **SIMMONS, C. J.** A man and two women boarded, at Thunderbolt, a suburban street-car for the purpose of returning to the city of Savannah. The man and one of the women were drunk and cursing, hugged and kissed each other after boarding the car, and failed to desist from such conduct when spoken to by the conductor of the car. There were also other females on the car, though they were near the front, while the man and two women first mentioned were in the rear. These three were arrested and accused, under section 396 of the Penal Code, of disorderly conduct on a street-car "by cursing, hugging, and otherwise acting in a disorderly manner, in the presence of females." The latter part of the section mentioned is as follows: "By indecent or disorderly conduct in the presence of females on passenger-cars, street-cars, or other places of like character, shall be guilty of a misdemeanor." The trial was had in the city court of Savannah, and the man and one of the women

were convicted, the other woman being acquitted. The woman who was convicted moved for a new trial, on the ground that ^{so} the verdict was contrary to law and the evidence and without evidence to support it. This motion was overruled, and the movant excepted.

There was no error in overruling the motion for new trial. The salutary statute under which the accused was convicted was enacted for the purpose of preserving peace and good order in the public conveyances of the state. The members of the legislature, besides many others who were in the habit of riding in public conveyances, had doubtless witnessed many scenes of disorderly conduct upon passenger-cars or street-cars in which females were also passengers. They had doubtless seen vulgar and drunken creatures acting in such a disorderly and indecent manner as to attract the attention of the other passengers, and using oaths in the presence of ladies who were also passengers on the car. This law was enacted for the purpose of punishing for such disorderly and indecent conduct and preventing its repetition. It was argued here for the plaintiff in error that, inasmuch as the females who were sitting in the front portion of the car had their backs turned to the accused persons, who were in the rear, the offense was not complete, because not "in the presence of females." We think that, under this statute, if the females were in the car upon which the disorderly conduct took place, it was not necessary, to make the offense complete, that they should be eye-witnesses of the disorderly or indecent conduct. Certainly, they could hear oaths as well with their backs turned as though they were looking at the person using them. We think the true construction of the statute is that if the disorderly or indecent conduct takes place on a street-car on which females are riding, it is in their presence, although their backs may be turned to the offenders. That being drunk, cursing, and hugging and kissing in an offensive manner, as was here shown to be the case, by a man and a woman on a street-car, is disorderly conduct, we think too clear to require any discussion. For the reasons given, we think that the court did not err in refusing to grant a new trial.

Judgment affirmed.

All the justices concurring.

CRIMINAL LAW.—ON DISORDERLY CONDUCT, see *Carr v. Conyers*, 84 Ga. 287, 20 Am. St. Rep. 357, and note. To make profane swearing a nuisance, it must be uttered in the hearing of divers persons: *State v. Pepper*, 68 N. C. 259, 12 Am. Rep. 637.

HAUPT v. STATE.

[108 GEORGIA, 58.]

TRIAL—CRIMINAL—ARGUMENT OF COUNSEL.—In a criminal trial, counsel should confine their arguments to the evidence in the case and not apply abusive epithets to the person on trial, but counsel may draw conclusions from the evidence and characterize the conduct of the accused; hence the saying that the defendant "is a self-confessed thief" is legitimate argument, if it is only a conclusion drawn from the evidence.

INDICTMENT—DESCRIPTION OF INSTRUMENT—VARIANCE.—While it is not necessary to the validity of an indictment to set out figures in the margin which constitute no part of the contract of the instrument, yet if such figures are set out they constitute matters of description, and the original cannot be admitted in evidence if there is a variation in matter of description between the copy set out and the original offered.

Walter C. Hartridge, for the plaintiff in error.

W. W. Osborne, for the defendant in error.

⁵³ **LITTLE, J.** 1. George W. Haupt was indicted by the grand jury of Chatham county for forgery. The bill of indictment contained two counts, one for falsely and fraudulently altering a certain genuine check, which is set out by its tenor. The second count charged the accused with falsely and fraudulently passing the same check. He was convicted, and made a motion for a new trial, which being overruled, he excepted. In addition to the grounds that the verdict was contrary to the evidence and against the law, the movant alleged that the court erred in admitting certain evidence of a witness, which is set out in the motion; and, by the third ground, that the court erred in admitting in evidence certain other genuine checks drawn by the maker of the check alleged to have been altered; and, in the fourth ground, that the court erred in admitting the testimony of a witness of a conversation he had with the accused about the time it was charged that the check was altered, in which the accused stated to witness that he was then under arrest on account of some transaction he had had with ⁵⁴ a certain church, and that he, the accused, was short of that fund about eleven hundred dollars, and that the church had demanded settlement of his account; the witness testifying that the accused at the same time handed him a thousand dollars in money, together with a check on the Citizens' Bank. The witness further testified that the occasion of the conversation was that the accused had sent for him to come up town and stand on his bond.

It was also alleged, in the motion for new trial, that the court erred in permitting the solicitor general in his argument to the jury to use the following language: "He [referring to the defendant] is a self-confessed thief. He is a man who confessed that he was short with the church," and other language not sustained by the evidence. All of said rulings were made over the objection of the counsel for the accused, offered at the proper time. We do not think that any error was shown under either of these grounds. Certainly, the evidence tended to show facts and circumstances which, if true, bore on the issue involved. The language of the solicitor general in making his argument to the jury, as explained, does not call for any reversal of the judgment overruling the motion. While counsel should be confined to the evidence in the case, and should not be permitted to indulge in abusive epithets of the person on trial, at the same time the field of legitimate argument is not circumscribed by any rule which forbids counsel to draw conclusions from the evidence and in plain words to characterize the conduct of the accused. As to whether the evidence supports such a characterization neither this court nor any other ought to stop to inquire. Counsel for the accused will almost certainly put a different interpretation on evidence tending to show facts from which guilt may be inferred than that placed on the same evidence by the state's counsel; and, so long as the latter remains within the domain of construction as distinguished from unwarranted abuse, he is not to be restrained. It is just as legitimate for the solicitor general to say to the jury that from the facts proved the defendant is a confessed thief as it is for the counsel for the accused to say to the jury that the facts demonstrate that the accused is an innocent and much wronged man. Both are conclusions. Neither may ⁵⁵ be right. Each is within the legitimate limits of argument. While the language used by the solicitor general appears to be harsh, it was, in view of the evidence, legitimate.

2. The remaining ground of the motion necessary to be specifically considered alleges error in that the court allowed the state to introduce in evidence the check which the accused was charged with having altered. The objection made to the introduction of this paper was, that the indictment set out by its tenor a check in all respects conforming to that offered in evidence, except in the indictment as a part of the check it had on the face of it No. 36, while the check offered in evidence had on its face No. 136. We find that the check offered in evidence,

as it appears in the record, is different in several respects from the copy set out in the bill of indictment. The only point, however, which is made is that the check offered has on its face, in place of the "No. 36" as set out in the indictment, the words and figures "No. 136"; thus raising the question whether there was such a variance between the writing offered and that described in the indictment as rendered the former inadmissible in evidence. The able counsel who argued the case for the state in this court cited us to a number of authorities to prove the proposition that only material allegations are necessary to be proved. Among these are Clark's Criminal Procedure, Wharton's Criminal Pleading and Practice, Bishop on Criminal Procedure, and other modern and standard works which refer to the adjudications under which the rules there laid down are formulated. From an examination of these authorities, however, we are led to believe that, while the principles contended for are sound and supported, they are applicable only when the question is raised whether the instrument offered is admissible for want of sufficient description in the indictment, and not as to what differences between the description as laid and the instrument offered will cause the latter to be rejected as a variance. As an example, referring to the citation made from Wharton's Criminal Pleading and Practice, cited as showing that modern rules tend to establish the doctrine that variance in the writing or printing is immaterial if the identity of the writing is manifest, it will be found that in the text to ⁵⁶ support which the reference is made, the author is treating the question whether instruments, as in forgery and libel, must be set out in full in the indictment; and it cannot, of course, be made applicable to the question as to what variances between the description as made in the indictment and the instrument offered are fatal. The same is true as to the citations from other text-writers who, as we shall presently see, lay down an entirely different rule to determine the question made in this record. It must be admitted as a correct proposition of law that, in setting out in the bill of indictment a copy of the instrument alleged to have been forged, it is not necessary to include marginal notes, figures, and numbers; because such do not form any material part of the instrument, and, in so far, the old doctrine obtaining at common law has been modified. Mr. Bishop in the second volume of his New Criminal Procedure, section 406, declares the rule to be, that a recital by tenor should closely follow the original, but the number of a bank-bill, the devices, figures, and words in the

margin, introduced for ornament or to prevent counterfeiting, need not be averred (Bishop's New Criminal Procedure, sec. 407, note 8); that no allegation of a revenue stamp is essential in an indictment for forgery. In the case of *Commonwealth v. Taylor*, 5 Cush. 609, the supreme judicial court of Massachusetts held that the omission to recite figures, letters, and numbers does not vitiate the indictment. And in *Commonwealth v. Bailey*, 1 Mass. *62, 2 Am. Dec. 3, it was held that the number of a bank-bill need not be set out in an indictment for forgery. See, also, to the same effect, *People v. Franklin*, 3 Johns. Cas. 299.

All modern works, so far as we are informed, agree with these rulings. So that we may take it as established that the old common-law rule, which required instruments in cases of forgery to be literally set out in the bill of indictment, has been so modified as not to require minuteness of description. But that is not the question presented by this record, but whether, when a number has been set out as part of the description, it is necessary to prove it as laid. Mr. Bishop, in his *New Criminal Procedure*, after recognizing the doctrine that it is not necessary to particularize the instrument in the indictment by setting out numbers, devices, etc., says (2 Bishop's *New Criminal Procedure*, ⁵⁷ 408): "The pleader may, if he chooses, set out what is unnecessary; then, it being descriptive and in further particularization of the necessary part, the averment in this, as in the rest, must correspond with the instrument in proof, or the variance will be fatal." Mr. Clark, in his *Criminal Procedure*, page 326, states the rule to be, that "if an unnecessary allegation is descriptive of the identity of anything which it is necessary to state and prove, it cannot be so rejected, but must be proved." Underhill on *Criminal Evidence*, section 421, declares the rule to be, that any material variance between the alleged forged writing as proved and as set forth in the indictment is fatal when the writing is pleaded according to its tenor; and, for the proposition that while it is not necessary for the indictment to describe the writing with extreme minuteness, yet when so described strict proof must be had, cites *Powell v. Commonwealth* (Ky., Sept. 20, 1888), 9 S. W. Rep. 245; *State v. Smith*, 31 Mo. 120; *Hess v. State*, 5 Ohio, 5, 22 Am. Dec. 767; *State v. Fleshman*, 40 W. Va. 726; *Commonwealth v. Wilson*, 2 Gray, 70; *McDonnell v. State*, 58 Ark. 242. See, also, 2 McClain on *Criminal Law*, sec. 798; Wharton's *Criminal Evidence*, sec. 114; 1 Barbour's *Criminal Law*, 344. But there are several adjudications on the exact point raised in this case. It was held by the supreme court of

Ohio (*Griffin v. State*, 14 Ohio St. 55), that while it was not necessary to the validity of the indictment to set out numbers, mottoes, devices, words, or figures in the margin which constituted no part of the contract of the instrument, yet, if the indictment contained allegations descriptive of the identity of the bills charged to have been sold, such allegations, though unnecessary, could not be rejected as surplusage. And accordingly, the court held that the trial court erred in allowing the bank-notes Nos. 1750 and 1758, or either of them, to be given in evidence, when the bank-note set out in the indictment was No. 175, on the principle that the number set out in the indictment was descriptive and for the purpose of identifying the bill; being so, it must be proved as described: Citing 3 Starkie on Evidence, 1530; *State v. Noble*, 15 Me. 476. In the case of *United States v. Mason*, 12 Blatchf. 497, the court held that: "In an indictment for uttering a counterfeit bill, if the bill is incorrectly described in respect to its bill number, the variance is fatal." And the rule is stated to be, that under such an indictment the description ⁵³ set forth, although needlessly particular, must conform to the instrument given in evidence.

The rule which we are contending for has also been recognized by this court. In the case of *Fulford v. State*, 50 Ga. 591, the accused was indicted for an assault with intent to murder. The indictment particularized the offense as having been committed "by pushing, striking, assaulting, and threatening the said J. A. Conway." In that case, the court followed the rule that if the prosecutor state the offense with unnecessary particularity, he will be bound by that statement and must prove it as laid; and in discussing what were material and immaterial averments, and where those which might have been omitted when once introduced become an important part of the indictment, not to be rejected as surplusage, said: "It was not necessary that the pleader should have stated the acts of the defendant which constituted his 'aiding and abetting,' or to define how it was done. The 'aiding and abetting' was an essential averment. The defendant was charged with so doing 'by pushing, striking, assaulting, and threatening the said Conway.' He was put on notice that it would be proved on him that he did these things. He proposes to meet the charge and show that he did not push, strike, assault, or threaten the said Conway. . . . The prosecution, knowing this, proposes to strike out all these descriptive averments and leave an open field for any and all proof of any and all forms or ways in which the aiding and abetting may be

shown. This would be permitting a defendant to be called upon to meet a charge specifically made in one form, and then to allow him to be convicted by a change of the indictment on proof of acts totally distinct from those of which he was notified." In the case of *Crenshaw v. State*, 64 Ga. 449, the indictment charged the accused with stealing "one blue hog, to wit, a sow weighing about one hundred and forty pounds and having the marks following, to wit, a swallow fork in the right ear and a smooth crop in the left ear." The description proved at the trial differed from that set out in the indictment, in that, among other things, the left ear bore the swallow fork and the right ear the smooth crop. This court held, through Justice Bleckley: "Though it was unnecessary to have described the animal by the earmarks, yet the descriptive terms of the indictment having gone to this extent, the burden was assumed of proving the specific marks alleged: *Roscoe's Criminal Evidence*, 192; 2 *Russell on Crimes*, 788; *United States v. Noble*, 15 Me. 476; *Fulford v. State*, 50 Ga. 591." In the case of *Allgood v. State*, 87 Ga. 668, the plaintiff in error was indicted, tried, and convicted of forgery. The instrument charged to have been forged was a deed. Its admissibility was objected to on the ground that it did not correspond with the one set out in the indictment. The variances were these: The word "hereby" appeared in the first line of the second page of the indictment, while in the deed the word "hereby" appeared to be in the third line; the indictment used the word "parcel," in the deed it was spelled "parsel"; the indictment had the word "heirs," the deed "hears"; the indictment had the word "warrant," the deed had it "warent." This court held in that case, that these small variances in spelling were not sufficient to vitiate the indictment for forgery, nor to prevent the forged deed from being put in evidence; and in so ruling it was in exact accord with an established rule (not in conflict with the rule of evidence we have just shown to exist) stated by Mr. Barbour in his work on Criminal Law, to be that when a written instrument or parts of it are professed to be set out verbatim, the slightest variance between the indictment and the evidence in this respect would be fatal. A mere literal variance, however, where the omission or addition of a letter does not alter or change the word so as to make it another word, will not be material; as, "receved" for "received," "undertood" for "understood," "Messes." for "Messrs.," or the like: See, also, *Shope v. State*, 106 Ga. 226. Two rules must, therefore, be taken as established, namely, that where it is un-

dertaken to literally set out a written instrument in an indictment, the original cannot properly be admitted in evidence if there is a variation between the copy set out and the original offered, in matter of description; that while it is not necessary that minute particulars should be employed in setting out the copy, yet, when so employed, such particulars constitute matters of description, and, being so, proof of the instrument must correspond to the description as laid. In the copy as laid in the bill of indictment the number of the check "36" appears as a part of the description of the instrument which was alleged to have been altered; evidence to prove the allegation was offered to be made by a paper having an entirely different description as to number, that is, No. "136." The instrument offered, therefore, not only did not support the description which was given, but in one particular it differed from it. There was a variance, and because of such variance the instrument should not have been admitted. Having been admitted, a new trial is awarded.

Judgment reversed.

All the justices concurring.

AN INDICTMENT FOR FORGERY must set forth the instrument forged with literal accuracy, or show good reason for the omission to do so; and the instrument thus set forth must be shown in the proof with the same accuracy; *Luttrell v. State*, 85 Tenn. 232, 4 Am. St. Rep. 760. But the number of a bank-bill and the marginal figures indicating its amount, not being parts of the bill, need not be set out in the instrument: *Commonwealth v. Bailey*, 1 Mass. 62, 2 Am. Dec. 3, and note.

ON IMPROPER REMARKS BY COUNSEL in criminal trials, see *Kearney v. State*, 101 Ga. 803, 65 Am. St. Rep. 844; extended note to *McDonald v. People*, 9 Am. St. Rep. 559-570.

BRANAN v. ATLANTA & WEST POINT RAILROAD CO.

[108 GEORGIA, 70.]

SALE.—STOPPAGE IN TRANSITU is the right which a vendor has, when he sells goods on credit to another, of resuming possession of the goods while they are in the possession of the carrier or middleman in the transit to the consignee or vendee and before they come into his actual possession or the destination he has appointed for them, on his becoming bankrupt and insolvent.

SALE.—THE RIGHT OF STOPPAGE IN TRANSITU CAN BE DEFEATED only by an actual delivery of the goods to the consignee or to some one for him, or by an assignment of the bill of lading to a bona fide purchaser without notice that the goods had not been paid for.

Kontz & Conyers and D. J. Gaffney, for the plaintiffs.

⁷⁰ **LITTLE, J.** Branán Brothers instituted an action in trover against the Atlanta & West Point Railroad Company and C. V. Truitt, to recover ten boxes of tobacco. The evidence made substantially the following case: Spencer, Traylor & Co. sold to Cunningham, a merchant in La Grange, ten boxes of manufactured tobacco on a credit, and delivered the same to the Richmond & Danville Railroad Company at Danville, Virginia, to be forwarded to Cunningham, taking from the railroad company an ordinary bill of lading, which the consignors transmitted ⁷¹ to the consignee. The tobacco arrived in La Grange over the Atlanta & West Point Railroad, and was placed in the warehouse of the company for delivery. Cunningham became insolvent, and was indebted to the firm of Branán Brothers in the sum of one hundred and seventy-six dollars. A member of that firm called on Cunningham for the payment of the debt; the latter proposed to pay the bill with the tobacco, which was then in the warehouse of the railroad company and had not been delivered. The proposition was accepted. Cunningham gave an order on the agent of the Atlanta & West Point Railroad, to deliver to C. I. Branán the tobacco then in the carrier's possession, consigned to him, being the tobacco which had been shipped by Spencer, Traylor & Co. At the time of the delivery of the order, Cunningham also delivered to Branán Brothers the bill of lading for the tobacco, which was an ordinary contract of affreightment, specifying the name of the consignor and the goods shipped, and stipulating that they were to be transported to La Grange and delivered to Cunningham. There was no indorsement or assignment of the bill of lading, nor did Branán Brothers know that the tobacco had not been paid for. After

receipt of the order and bill of lading, the representative of the firm presented the order and bill of lading to the agent of the railroad company, paid the freight on the same, went to the place in the depot where the tobacco was deposited, put his hands upon it and told the agent that he desired to mark it to his firm at Atlanta. The agent said that he would take charge of it for Branam Brothers and ship it to Atlanta, consigned to that firm as directed, and in pursuance of such understanding gave to Branam Brothers a receipt in the following words: "Atlanta & West Point R. R., La Grange, 4/21/92. Received from Branam Bros. ten boxes tobacco, 550. Consignor, Branam Bros. Destination, Atlanta, Ga. A. R. Ravenscroft, Agent." The purchase was in payment of an antecedent debt, and the price was reasonable. Cunningham did not go to the depot with the representative of the firm. Later on in the day, and while the tobacco was in the warehouse awaiting shipment to Atlanta, Spencer, Traylor & Co. notified the railroad company not to deliver the tobacco to Cunningham, but to deliver the same to Truitt, one of the defendants ⁷² in error. This was done, and the action was brought by Branam Brothers to recover the tobacco. On the trial the jury, under the charge of the court, rendered a verdict in favor of the defendants. A motion for a new trial was made on several grounds, and overruled. The plaintiffs excepted. A number of grounds are set out in the motion for a new trial; but inasmuch as the case turns upon the question of a proper construction of the law regulating a vendor's right of stoppage in transitu, we find it more satisfactory to discuss and apply to the facts of the present case the rules of law which govern such stoppage, than to formally pass upon the several grounds of the motion.

There are several definitions of this right given by text-writers, as well as made by adjudicated cases, which we have examined with some interest. Chancellor Kent, in the second volume of his Commentaries, page 702, defines the right of stoppage in transitu to be that which the vendor has, when he sells goods on credit to another, of resuming possession of the goods while they are in the possession of the carrier or middleman in the transit to the consignee or vendee and before they arrive into his actual possession or the destination he has appointed for them, on his becoming bankrupt and insolvent. The supreme judicial court of Massachusetts (*Stone v. Simonds*, 131 Mass. 457), declares that the right of stoppage in transitu is an equitable extension, recognized by the courts of common

law, of the seller's lien for the price of goods of which the buyer has acquired the property but not the possession. Mr. Hutchinson in his *Law of Carriers*, section 409, says that this right is based on the plain reason of justice and equity, that one man's goods shall not be applied to the payment of another man's debts, and that if after the vendor has delivered the goods out of his own possession, and has put them into the hands of the carrier for delivery to the buyer, he discovers that the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession, and thus avoid having his property applied to paying debts due by the buyer to other people. An interesting discussion of the seller's right of stoppage in transitu is found in Professor Burdick's *Treatise on the Law of Sales* 73 of *Personal Property*, page 217. This author declares that this right is not founded on any contract between the parties, nor on any ethical principle, but upon the custom of merchants; that while it is analogous to the right of lien, the two differ in some important respects. That is, the right of lien is not available unless the seller is in possession of the goods in the character of an unpaid former owner, and this right is determined as soon as the buyer or his agent lawfully obtains possession. On the other hand, the right of stoppage in transitu does not come into existence until the goods have passed out of the vendor's possession into the hands of a carrier for transmission. It is immaterial, however, for the purposes of this discussion, to ascertain whether the right is in the nature of a lien, or whether it arises from the custom of merchants. Certainly, it exists under certain well-defined rules and regulations, and it is a right which is favored by the courts. It is essential, however, to the exercise of the right, that the goods should be in transit at the time. Mr. Parsons, in his *Law of Contracts*, volume 1, bottom page 624, says that it is sometimes difficult to determine whether the goods which it is sought to stop are still in transitu, and declares that it is well settled that goods are in transitu not only while in motion, and not only while in the actual possession of the carrier, but also while they are deposited in any place distinctly connected with the transmission or delivery of them, or, rather, while in any place not actually or constructively the place of the consignee, or so in his possession or under his control that the putting them there implies the intention of delivery. And again, on page 626 of the same volume, this author declares that they are in transit until they pass into the possession of the vendee.

Our Civil Code, section 2285, declares that the right continues until the vendee obtains the actual possession of the goods; and it is also declared in section 3552 of the same code that, if the goods are delivered before the price is paid, the seller cannot retake because of failure to pay, but, until actual receipt by the purchaser, the seller may at any time arrest them on the way and retain them until the price is paid. Again, it is provided by section 3553 of the same code, that a bona fide assignee of a bill of lading of goods for a valuable consideration, and without notice that the same were unpaid for, and the purchaser insolvent, will be protected in his title against the seller's right of stoppage in transitu. These three sections of the code, taken together, seem to declare the proposition that until the goods actually come into the possession of the consignee the right of stoppage in transitu continues, and the only exception made is that a bona fide assignee of the bill of lading for a valuable consideration, who has no knowledge that the same have not been paid for, and the purchaser insolvent, will be protected against this right. While the cases passed on by this court which bear on this subject are few, the principles on which they were ruled are plainly and explicitly stated. In the case of Macon etc. R. R. v. Meador, 65 Ga. 705, the plaintiffs undertook to stop in transit certain boxes of tobacco which they had shipped from Atlanta to Macon, consigned to Carlos. After the goods had arrived in Macon, the treasurer of the railroad company, under an agreement with the consignee, set the tobacco aside to be sold by the company to pay past due freights, and, if any balance remained, to pay the same to the consignee. The consignee having been forced into bankruptcy, the question arose whether the tobacco had been so delivered into the possession of Carlos as to defeat the right of stoppage in transitu. In dealing with this question, the court calls attention to the fact that the consignee did not go with Brantley, the treasurer, and have the boxes of tobacco set apart, but gave orders in relation to the same, and they were set apart under such orders by being moved from one part of the carrier's warehouse to another. and that actual possession was never in Carlos at all, but that possession in him was only constructive. It also calls attention to the fact that the bill of lading had not been delivered nor transferred, nor the freight paid. Under these circumstances, it was ruled that there never was any actual possession in Carlos, the consignee, nor any actual delivery to him or to anybody for him. There are a number of decisions of

other courts, which, had they been followed, would have constrained the ruling that such a constructive delivery of the ⁷⁵ tobacco as appears in *Macon etc. R. R. v. Meador*, 65 Ga. 705, would have defeated the right of stoppage; but this court, in construing the principles of law contained in the three sections of the code which we have quoted above, in *pari materia*, held the rule to be, that the right would not be defeated until actual possession of the goods had been secured by the consignee, except only in the case of an assignee of the bill of lading, without notice that the goods had not been paid for, and the fact of the insolvency of the consignee.

That such was the construction of our code is made manifest by the ruling in the case of *Ocean S. S. Co. v. Ehrlich*, 88 Ga. 502, 30 Am. St. Rep. 164. In that case, goods were consigned in New York to be delivered to Epstein & Wannbacher at Savannah, and shipped by the Ocean Steamship Company. On arrival they were placed on the wharf of the steamship company, the freight and wharfage had been paid, and nothing remained to be done to change the actual possession from the carrier to the consignee except to remove the goods. It was shown that it was the custom of the carrier to deliver goods so placed, when the freight and wharfage were paid, without requiring the bills of lading. The consignees sold the goods to Ehrlich and exhibited to the purchaser the bills of lading, but executed no assignment of such bills. They delivered to him the receipted freight and wharfage bills and also an order on the carrier for the goods, and Ehrlich paid the agreed purchase price. On exhibition of the order to the carrier, a part of the goods were delivered and carried away. On returning for the remainder, it was found that the consignor in New York had notified the carrier not to deliver the goods to the consignee. The carrier, acting under the notice, refused to make further delivery of the goods; and the question was, Were the consignors in time? After citing the provisions of the code above referred to, Chief Justice Bleckley, delivering the opinion of the court, said: "Under these provisions nothing defeats the right of stoppage but actual possession in the vendee, or bona fide assignment of the bill of lading. . . . The actual possession of the goods not removed from the wharf was certainly never in [the consignees], and what they did ⁷⁶ not have they could not confer on their vendees. . . . As the consignors were not too late relatively to the consignees, they were not too late as to purchasers from the consignees who had not obtained actual pos-

session. . . . If these bills had been assigned, that would have been equivalent to an actual delivery of the goods. The law recognizes no substitute for such assignment. . . . This right is regulated by law, and is terminated or defeated only in the way which the law recognizes." It is not necessary, for a proper decision of the question which arises in the present case, to add anything to this adjudication, but an examination will show that the same principles are ruled and adhered to in very many adjudicated cases emanating from other jurisdictions. In the case of *Calahan v. Babcock*, 21 Ohio St. 281, 8 Am. Rep. 63, the supreme court of Ohio ruled: "The right of stoppage in transitu is regarded with favor, and the engrafting of further restrictions upon the rule governing it is not warranted by public policy. The right of stoppage in transitu is extinguished only by the actual and complete delivery of the goods consigned, to the vendee or to some agent of and for him." Again, in the case of *McElwee v. Metropolitan Lumber Co.*, 37 U. S. App. 268, 69 Fed. Rep. 302, the circuit court of appeals ruled: "No subsale during transit will defeat the right, unless the bill of lading be transferred." In the case of *Loeb v. Peters*, 63 Ala. 243, 35 Am. Rep. 17, the supreme court of Alabama ruled: "The right of stoppage by the seller is lost, when, before it is exercised, the purchaser has sold the goods, and indorsed the bill of lading, to a subpurchaser for value in good faith." To the same effect see *Becker v. Hallgarten*, 86 N. Y. 167, and a large number of cases cited in 5 *Lawson's Rights, Remedies, and Practice*, section 2495, note 4.

The claim of the plaintiffs in error in this case is, that the sale made to them by the consignee, and the subsequent recognition of such sale by the carrier, and the agreement on its part to reship the goods, was such a delivery as vested in them title to the goods free from the right of stoppage in transitu. It must be remembered, however, that nothing will defeat this right, except actual possession of the goods by the consignee, or an assignment of the bill of lading, which is a symbolic ⁷⁷ delivery of the property. Neither of these things was done. Cunningham never did have possession of the goods. The bill of lading was never assigned by him to plaintiffs in error. It cannot be doubted, under the facts which appear in the record, that Branam Brothers purchased the goods in good faith from Cunningham, the consignee, but it cannot be insisted that by such purchase they obtained any better title than Cunningham, the consignee, had when the goods were delivered to the carrier

in Danville, Virginia. The legal effect of such delivery was to vest the title in Cunningham, and it so remained, but the title which he held was subject to the right of the vendor to stop the goods before actual delivery. He could convey to the purchaser from him no more than he had; and therefore Branan Brothers, taking Cunningham's title, took the tobacco subject to the right of the vendor to stop it so long as it remained in the hands of the carrier: *Holbrook v. Vose*, 6 Bosw. 76. If it be said that the goods were not in the hands of the carrier for delivery to the consignee, the reply is, that as long as the company in any capacity, except as agent of the consignee has control of the goods, whether carrier or warehouseman, the vendor's right is not terminated; for as long as anything remains to be done in order to complete a delivery to the consignee, that long the right of stoppage in transitu endures: 4 Elliott, R. 2395, and note 3, making reference to a large number of adjudicated cases. There had been no actual delivery of the goods either to the consignee or Branan Brothers. Under the authority of *Macon etc. R. R. v. Meador*, 65 Ga. 705, the delivery to the latter was constructive, not actual. Without actual delivery or the legal symbol of it, the purchaser could not defeat the right. Subject to this right, the purchaser changed the destination, to which change the carrier assented, but while in its hands as carrier, before the goods had been started to their new destination, the right to stop was exercised; and so long as they remained in the possession of the carrier and it had control over them, the right existed in the original vendor as against the consignee who had never had them, and a purchaser from them who bought subject to the right. In our judgment, the court committed no error in the charge of which 7th complaint was made. The verdict is in accordance with the law and evidence, and the court committed no error in overruling the motion for a new trial.

Judgment affirmed.

All the justices concurring.

SALES.—STOPPAGE IN TRANSITU is the right of the seller to reassume the possession of goods not paid for, while on their way to the purchaser, in case of his insolvency before he has acquired the actual possession of them: *Kingman v. Denison*, 84 Mich. 608, 22 Am. St. Rep. 711; *Diem v. Koblitz*, 49 Ohio St. 41, 34 Am. St. Rep. 531. It is a right favored by the law: *Tufts v. Sylvester*, 70 Me. 213, 1 Am. St. Rep. 303; and is not terminated until the goods are delivered, actually or constructively, to the consignee or his agent: *Jeffris v. Fitchburg R. R. Co.*, 93 Wis. 250, 57 Am. St. Rep. 919.

DAVIS v. COMER.

[108 GEORGIA, 117.]

JUDICIAL SALE—DORMANT EXECUTIONS.—A sale by a sheriff under a dormant fieri facias is absolutely void, and the failure of the defendant to appear at such sale after notice does not estop him from making a subsequent attack on the validity of the sale, when he is sought to be dispossessed by one who claims title under the deed made by the sheriff.

J. B. Geiger, for the plaintiff in error.

Wooten & Wooten, for the defendants in error.

¹¹⁷ LEWIS, J. It appears from the record that McMillan & Co. obtained a judgment in a justice's court against Thomas A. Davis, and that the fieri facias probably issued thereon in 1875. This fieri facias was levied on the property in dispute, as the property of the defendant, Thomas A. Davis, in 1891, and it seems that the property was bid in by McMillan and a deed made by the sheriff to him on the first day of December, 1891. John A. McMillan executed a mortgage to Comer & Co., the defendants in error in this case, upon divers tracts of land, including this land which had been sold at sheriff's sale under the execution against Davis. The mortgage was foreclosed, and the fieri facias was levied upon the property described in the mortgage, including the premises in dispute. To this levy Thomas A. Davis and T. G. Gillis filed a claim. A verdict was rendered finding the property subject, and Davis assigns ¹¹⁸ error in his bill of exceptions upon the judgment of the court overruling the motion for a new trial. The claimants contended that the defendant in the mortgage fieri facias had no title to this land, for the reason that the sheriff's sale under fieri facias from the justice's court was void, the fieri facias being then dormant. On the trial it appeared that the original fieri facias had been lost, and parol evidence was admitted to show its contents and to prove the entries that had been made thereon by the sheriff or constable. The evidence in behalf of the plaintiffs below tended to establish their contention that the fieri facias was kept in date by virtue of entries of nulla bona thereon by the proper officer. The weight of evidence, however, was in favor of the contention of the claimants that the fieri facias was dormant at the time of the levy. It does not appear that the defendant in fieri facias, Davis, was present at this sale under the fieri facias from the justice's court, but it

seems that he relied upon someone else to represent his interests and file a claim, which was neglected. There was some evidence that after the sale the sheriff formally put him out of possession; but the evidence is uncontradicted that he did not remain out fifteen minutes, but continued in possession until after the time of this levy of the mortgage *feri facias*.

1. Among the errors alleged in the motion for a new trial was the ruling of the court that the evidence adduced on the trial made no question of fact for the jury to pass upon, but only a question of law; and "because the court erred in holding, after the evidence was all in and the case closed, that since the claimant Davis interposed no defense to the levy of the justice court *feri facias* which was levied upon the land in controversy on the first day of December, 1891, said *feri facias* being in favor of J. A. McMillan & Co., and against T. A. Davis, and from which levy and sale made in pursuance thereof by the sheriff the title of the defendant in *feri facias* in the case now pending originated, the said Davis was estopped from now setting up a claim to the said property." The court accordingly directed the jury to render a verdict in favor of the plaintiffs in *feri facias*, to which exception is likewise taken in the motion. As before seen, the issue as to whether the *feri facias* was actually dormant ¹¹⁰ at the time of the levy was one of fact. Upon it there was a conflict of testimony, with ample evidence to sustain the claimants' contention that it was dormant. A sale by a sheriff under a dormant *feri facias* is absolutely void, just as much so as if there had been no judgment whatever against the defendant, and no process in existence authorizing the sheriff to seize and sell any of his property. As decided by this court in the case of *Welch v. Butler*, 24 Ga. 451, 452: "The statute declares a dormant judgment to be void and of no effect. It, therefore, requiring no act of the party to avoid it, falls not within the class of voidable judgments. All acts done bona fide under a voidable judgment are good until it is set aside. But no act is good under a void judgment, and even a bona fide purchaser can acquire no title under it." If the justice's court judgment, therefore, was dormant when this property was levied upon by the sheriff, his sale under such a process was absolutely void as a judicial sale. We cannot understand, under the facts disclosed by this record, how the judge reached the conclusion that the defendant in *feri facias* was estopped from afterward making this attack upon the sale. There is nothing in the record to

show any conduct by the defendant in *feri facias* upon which the purchaser at the sale or any other person acted to his injury. The defendant was not even present. He was at the time in possession of the property, and he did not abandon this possession, even after the sale. He had not said or done anything which could be construed as an acquiescence in the sale. With the same show of reason, it might be contended that a party who knows of a pending suit against him will be bound by a judgment rendered therein, though he has never been served with process and has never acknowledged service or appeared and pleaded to the merits of the action. Without such service he can, of course, treat the suit as a mere nullity; and while he may by proper pleading prevent the rendition of a judgment against him, for want of service, yet if he chooses not to adopt this remedy, he will lose none of his rights thereby. The same principle is applicable to the case at bar. While the defendant in *feri facias* might have prevented the sale by a proper plea, ¹²⁰ yet he lost none of his rights by his silence, and could not, simply on account of a failure to act before the sale, be estopped from attacking such sale as absolutely void whenever its validity was insisted upon as a reason for interfering with his right to the possession of the property: *McLennan v. Graham*, 106 Ga. 211. There was manifest error, therefore, in excluding from the jury the controlling issue of fact with reference to the dormancy of the justice's court judgment in question. The entry of levy upon this property, made upon the mortgage *feri facias*, failing to show that the land in dispute was in the possession of the defendant in that mortgage *feri facias*, the burden of proof was upon the plaintiffs. If they had failed to show any title in the defendant, then their case must necessarily have failed, whether the claimants showed any title or not. The plaintiffs sought to show this title by a purchase at sheriff's sale, made by the defendant in the mortgage *feri facias*, against whom the plaintiffs in this case were proceeding. If the claimants had succeeded in showing that the sheriff's sale was void, then, under the facts in this case, there would have been no necessity for them to go further and show title in themselves. Even, therefore, if there is anything in the point, made in the argument by counsel for defendants in error, that when two joint claimants file a claim to land they cannot recover by simply showing title in one and not in both, it has no relevancy to the facts in this case; for that is a question which could not arise until the case reached a point where

the claimants were called upon to show their title to the property or an interest therein paramount to that of the defendant in *feri facias*. The single question to try in this case is whether or not the judgment upon which the justice's court *feri facias* issued was dormant at the time of the levy upon the property in dispute. If dormant, the burden of proof being upon the plaintiffs in *feri facias* to show title in the defendant, a verdict finding the property not subject is demanded.

Judgment reversed.

All the justices concurring.

EXECUTIONS—DORMANT JUDGMENTS.—A levy under an execution on a judgment more than five years old, without the issue of a *scire facias* thereon, is irregular merely and not void: *Sherrard v. Johnston*, 193 Pa. St. 163, 74 Am. St. Rep. 680, and note.

COSNAHAN v. JOHNSTON.

[106 GEORGIA, 235.]

RES JUDICATA—ESTOPPEL TO ASSERT CLAIM OF HOMESTEAD AGAINST PURCHASER.—Where after the foreclosure of a mortgage and upon the levy of a mortgage *feri facias* the defendant files a claim that the land has been set apart to him as a homestead, and a verdict against such claim is rendered and the property adjudged subject to execution, the defendant is concluded by such judgment from asserting any further homestead claim, and a purchaser of the land at sheriff's sale acquires a good title as against any homestead rights of the defendant.

F. W. Capers and W. T. Davidson, for the plaintiff.

J. R. Lamar, for the defendant.

²³⁶ **SIMMONS, C. J.** It appears from the record in this case that Cosnahan, in 1878, had a homestead set apart to him as the head of a family, for his wife and minor children, in certain lands in Burke county. The homestead papers appear never to have been recorded, and to have been lost. In 1883 Cosnahan executed to C. A. Rowland a note secured by a mortgage on this tract of land. The mortgagee transferred the note and mortgage, before due, to R. C. Rowland, administrator, who foreclosed the mortgage on the land. Execution was issued, and it was levied by the sheriff. Cosnahan, as head of a family, filed a claim in which he set up that the land had

been set apart to him as a homestead prior to the execution of the mortgage, and was, therefore, not subject to levy and sale. It seems from the record that Cosnahan established the lost "homestead papers," pending the trial of this claim case, but had not given to the plaintiff in fieri facias any notice of his motion to establish the papers. On the trial of the claim case, the jury returned a verdict finding the land subject, and the execution, by a judgment of the court, was ordered to proceed. Cosnahan made a motion for a new trial, which was overruled. He excepted, and brought the case to this court, where the judgment was affirmed, the court holding that the establishment of the lost papers was not binding upon the plaintiff in execution, as no notice was given him of the motion to establish, the latter being made pending the claim case: See *Cosnahan v. Rowland*, 99 Ga. 285. The land was sold under the fieri facias, and purchased by Johnston, the defendant in error here. ~~227~~ Subsequently, Cosnahan moved in the court of ordinary to re-establish the "homestead papers," and gave notice of his motion to C. A. Rowland, the original holder of the note and mortgage, and also claims to have served R. C. Rowland, who was a nonresident, by leaving a copy of the motion at the house of Johnston, who had represented him as his attorney in the claim case. The ordinary granted the motion to re-establish; whereupon Cosnahan brought an action of ejectment against Johnston to recover the land. Johnston in defense filed a plea of res judicata, and certain pleas to the merits of the cause. After hearing the evidence and argument, the court directed a verdict for the defendant.

There were various exceptions taken in the record to the admission and exclusion of evidence, but the view we take of the case renders it unnecessary to pass upon them. Cosnahan had in the claim case litigated with the mortgage creditor the identical question he now makes, and it was then decided that the land was subject to the mortgage fieri facias. The judgment of the court in the claim case was excepted to by Cosnahan and brought to this court, where it was affirmed. The land was sold under the judgment and purchased by Johnston. When the land was first levied upon by virtue of the mortgage fieri facias, Cosnahan was not compelled to file a claim as the head of a family to protect his homestead rights; but inasmuch as he did so and the title to the property was adjudicated to be in him as an individual and therefore subject to the mortgage lien as against his claim of homestead, he is estopped to again litigate

the same question in this action of ejectment. The court below decided that the homestead claims were not good as against the lien of the mortgage, and that decision was affirmed by this court. It was Cosnahan's fault that in the establishment of the homestead papers he failed to give proper notice. He cannot now, in our opinion, go through the form of re-establishing the papers and litigate the same question with the purchaser at the sheriff's sale. He is concluded by the judgment on every issue which he made or could have made in the claim case. Judgments are conclusive between parties and their privies. In the case of *Rival v. Gallagher*, 52 Ga. 630, in discussing ²³⁸ the conclusiveness of judgments in a case where a mortgage had been foreclosed, a claim filed, and the property found subject, and purchased at the sheriff's sale by a third party, McCay, J., said: "The purchaser stands as a privy to the plaintiff in execution, and has bought his rights." Johnston, being under this decision a privy of Rowland, the plaintiff in execution, could treat the former judgment between Rowland and Cosnahan as an estoppel against the latter as head of the family: See, also, *Webster v. Dundee Co.*, 93 Ga. 278; *Winship v. Phillips*, 54 Ga. 237; *Dickerson v. Powell*, 21 Ga. 143; *Russell v. Slayton*, 17 Ga. 277. If this were not so, the adjudication of a claim case would be entirely nugatory. The plaintiff in *feri facias* might levy upon property as that of the defendant, a claim be interposed by a third party, and the property found subject and sold to a bona fide purchaser; and the claimant, granting as sound the contentions of the plaintiff in error in the present case, could then bring suit against the purchaser and recover under the same title which he had sought to set up in the claim case. The title obtained by a purchaser at a sheriff's sale in cases where there had been a claim filed would amount to no more than where no such claim had been filed. We think it clear that in a case like the one now under consideration the judgment rendered in the claim case is conclusive, and binds the claimant as against the purchaser at the sheriff's sale under the execution.

Judgment affirmed.

All the justices concurring.

RES JUDICATA—HOMESTEAD.—After a judgment of foreclosure against a husband, he cannot, in defense of an action by the purchaser under such foreclosure, assert that the property was a homestead when the former judgment was entered: *Dodd v. Scott*, 81 Iowa, 319, 25 Am. St. Rep. 492. See, too, *Traders' Nat. Bank v. Schorr*, 20 Wash. 1, 72 Am. St. Rep. 17.

GEORGIA RAILROAD & BANKING CO. v. HOPKINS.

[108 GEORGIA, 324.]

RAILROADS—LIABILITY FOR ASSAULT OF EMPLOYEE.—Where a person who is permitted to remain in a depot at a time when passengers are not usually allowed there leaves it, and is later discovered in a car by the night watchman in an act of gross immorality, and upon being compelled to come out of the car curses and abuses the watchman and finally assaults him, and the watchman strikes him on the head, the railroad company is not liable for the assault made by the watchman, whether disproportioned to the insult or not.

Joseph B. and Bryan Cumming, for the plaintiff in error.

T. L. Reese, for the defendant in error.

324 COBB, J. Hopkins sued the railroad company, alleging that, while waiting at a station on the line of road of the defendant, he was assaulted and beaten by the night watchman, an employé of the defendant, and thereby sustained damages. Upon the trial it appeared from the testimony introduced by the plaintiff that he and others had repaired to the depot of the defendant to await the arrival of a train upon which they intended to take passage; that while in the waiting-room the night watchman came in, and in the presence of the females therein used profane and obscene language, and, upon plaintiff remonstrating with him, he turned and cursed plaintiff and struck him several licks on the head and shoulder with a pistol which he had in his hands, the plaintiff not having given any provocation either for the words used or the assault made. The 325 injuries inflicted were painful to the plaintiff, and he suffered therefrom for several months, and was still suffering from the effects of the assault. The testimony introduced by the defendant was, in effect, that the party to which the plaintiff belonged came to the depot some time before the arrival of the train, and at a time when the train was not due and when the waiting-room was not open for passengers; that they asked permission to stay in the depot until the train came; that the night watchman told them that he did not have any coal to heat the room and that he did not allow a crowd to stay about the depot that long in the night. Upon the statement being made that some of them had no place to stay, the night watchman agreed to open the room if they could stay in there without fire. After they were thus permitted to go in, it was so cold that the night watchman divided with them the coal which had been given

him for use during the night, and directed them to stay in the room and not to go about the cotton or cars. There were several cars at the depot, some loaded and others empty. Plaintiff and his party were cautioned not to go among the cars and cotton, on account of danger of fire from cigarettes and cigars. The night watchman, while making his rounds during the night, had his attention directed to some one in a car which was open, and upon going in with his lantern he discovered plaintiff and a woman in the car engaged in an act of immorality, and another man and woman in the car engaged in a similar act of indecency. Upon being compelled to come out, the plaintiff took great offense at the conduct of the watchman in thus discovering him, and commenced talking, but the night watchman paid no attention for the time to his talking. The plaintiff continued to talk after he had returned to the waiting-room, and the night watchman, hearing him, asked him who he was talking about, and received the answer, "I am talking about you." He had been cursing and abusing the night watchman and was sitting on the seat, and the night watchman caught him by his coat sleeve and pulled him off. He then assaulted the night watchman, who told him if he did not behave he must get out of the room. Further altercation ensued between them, in which very insulting language was used by the plaintiff, ³²⁰ and finally, being aggravated by the continual insulting language of the plaintiff, the night watchman struck him on the head with his fist, but did not hit him with a pistol. He pulled out a pistol and told him that he had a good mind to shoot him, but he struck him with his fist only. The jury returned a verdict for the plaintiff; and the defendant's motion for a new trial being overruled, it excepted.

The only ground in the motion for a new trial which is insisted upon here is, that the court, after charging the following request: "If you believe that the plaintiff was guilty of immoral conduct in his acts in the depot of the defendant, and that as a result of the discovery of such conduct words followed between the plaintiff and the watchman, and that the plaintiff used insulting and opprobrious language to the watchman which naturally enough resulted in a difficulty, the company should not be held responsible for alleged assault by the watchman," added: "That I give you in charge in this connection, or with this added to it: that the assault by the watchman must not be disproportioned to the insult offered; it being still left a question of fact for you to determine whether the battery was

disproportioned to the insult." The request should have been given without the qualification. *City Electric Ry. Co. v. Shropshire*, 101 Ga. 33, and cases cited, establish the proposition, that where a person is injured under such circumstances as the testimony of the defendant in the present case shows the plaintiff to have been injured, he is to be regarded as having forfeited his right to immunity from unnecessary violence by inviting the servant of the company to disregard and abandon his official duty and enter into a personal encounter on his own account and upon his own responsibility; and when the conduct of the plaintiff is such as to thus relieve the company from liability on account of the assault committed by its servant upon the plaintiff, it is immaterial, so far as the question of the liability of the company is concerned, whether the battery was disproportioned to the insult or not. Such being the law, it was erroneous for the judge to qualify the request in the language above quoted. The defendant was entitled to have the evidence introduced by it passed upon by the jury in the ³²⁷ light of the law embodied in the request, and the error committed in qualifying it in the manner stated was of such a character as to require the granting of a new trial. Even if, under the facts of the present case, the plaintiff could be considered a passenger and entitled to the rights of one sustaining that relation to the defendant, if the jury believed the testimony introduced for the defendant, there would be no liability on its part for the assault committed by the night watchman.

Judgment reversed.

All the justices concurring.

RAILROADS—ASSAULT BY EMPLOYÉ.—If a passenger on a railroad applies to the baggage-master to have his trunk checked, and, the checking not being done promptly, uses threatening and abusive language, whereupon the baggage-master strikes him, the railroad company is not liable for the assault: *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373. See, too, *Baltimore etc. R. R. Co. v. Barger*, 80 Md. 23, 45 Am. St. Rep. 319, and note.

HILLSINGER v. GEORGIA RAILROAD BANK.

[108 GEORGIA, 357.]

BANKS.—A CERTIFICATE OF DEPOSIT issued by a bank, payable to the order of the depositor "on return of this certificate properly indorsed," is not due immediately, but only upon presentation thereof at the bank with a demand for payment.

Garnishment against the Georgia Railroad Bank. After the service of garnishment, but before answering, the certificate of deposit recited in the opinion was indorsed and transferred for value to third persons, to whom the bank paid it. The bank answered, denying it owed anything. Judgment was rendered against the garnishee.

F. W. Capers, for the plaintiff.

Bryan Cumming, for the defendant.

³⁵⁸ LUMPKIN, P. J. This case turns upon the determination of a single question, viz., whether or not a certificate of deposit issued by a bank, in the form below given, is due immediately or only upon presentation thereof at the bank with a demand for payment: "Georgia Railroad Bank. No. 3013. Augusta, Ga., April 19th, 1898. Arnt Anderson has deposited in this Bank Forty 00|100 Dollars, payable to the order of himself on return of this certificate properly indorsed. Not subject to draft. [Signed] C. G. Goodrich, Cashier." The real inquiry is: What construction should be placed upon the words, "on return of this certificate properly indorsed"? We think their plain meaning is, that the paper itself must be brought back to the bank and a demand made for the money; and we know this view concurs with the common course of business in such matters. It is not contemplated, when a depositor places money in a bank and takes a certificate of this character, that the officials of the bank are to seek him out and make payment to him, but that he, or his indorsee, when payment is desired, will bring the certificate to the bank and ask for the ³⁵⁹ money. In this connection, see 1 Morse on Banks and Banking, sec. 301. Our own case of *Lynch v. Goldsmith*, 64 Ga. 42, is not in conflict with what is here ruled. There, the certificate was payable with interest "on call," and the court held it was, "in effect, a negotiable promissory note, payable generally on demand and due immediately." This conclusion was doubtless reached upon the idea that the words "on call" were

the exact equivalent of the words "on demand." It seems, however, that Bleckley, J., by whom the opinion in that case was delivered, was not entirely satisfied as to the correctness of the judgment; for, on pages 50, 51, he said: "Having spoken thus far for the court, candor obliges me to add that since the decision was pronounced the following line of reflection has occurred to me: What is a certificate of general deposit issued by a bank? Is it not an acknowledgment of the bank that it has received a loan of money from the depositor, coupled with a promise implied, if none be expressed, that it will repay the loan at the bank upon actual demand or call, if no particular time or place be specified? Does not the known course of business require this construction, and does not the nature of the transaction suggest it? If these questions be answered in the affirmative, there is no dishonor of the certificate until after actual demand at the bank, and consequently not until after such demand is the paper overdue." The language just quoted is peculiarly pertinent to the question now before us; and, moreover, the distinction between that case and the present one is clear and well marked. The requirement in the certificate for its "return" means something more than is indicated by the words "on call." A call for payment could be made by a written notice sent to the bank, or otherwise, in which event it might be incumbent upon the bank to seek out the creditor and pay him his money. But if he must return the certificate as a condition precedent to his right to demand payment thereof, it seems to follow inevitably that the instrument is not to be considered due until, in compliance with this essential prerequisite, the paper is actually returned and payment requested over the bank's counter. If the foregoing be sound reasoning, it is evident that the cases of *Morrison v. Morrison*, 102 Ga. 170, ³⁰⁰ and *Hotel Lanier Co. v. Johnson*, 103 Ga. 604, are in no way applicable to the case in hand. In them this court was dealing with ordinary promissory notes payable generally "after date," and applied to them the rule which governs instruments of that character when made payable "on demand."

Judgment affirmed.

All the justices concurring.

Certificates of Deposit.*

Definition.—"A certificate of deposit is ordinarily defined to be a written acknowledgment by a bank or banker of the receipt of a

*REFERENCE TO MONOGRAPHIC NOTES.

Certificates of deposit: 42 Am. Dec. 576-579.

sum of money on deposit, which the bank or banker promises to pay to the depositor, to the order of the depositor, or to some other person or to his order": First Nat. Bank v. Greenville Nat. Bank, 84 Tex. 40. To give a certificate the character of a certificate of deposit, the deposit must be one of money, and the relation established is that of debtor and creditor: First Nat. Bank v. Greenville Nat. Bank, 84 Tex. 40. And this relation of debtor and creditor is not changed by the bank's promise to place the money in a separate package, which it fails to do. The deposit, by reason of such promise, is not held in trust, but becomes the property of the bank, and the relation of debtor and creditor is still maintained: Bayor v. American etc. Bank, 157 Ill. 62. The words "promise to pay" are not essential in the certificate, the law implying a promise to repay when the fact of deposit is established: First Nat. Bank v. Greenville Nat. Bank, 84 Tex. 40. While money for which a certificate of deposit is given by a bank is, in legal effect, in the nature of a loan (Leaphart v. Commercial Bank, 45 S. C. 563, 55 Am. St. Rep. 800), yet it is not a borrowing of money in the ordinary sense of the term, but a real deposit as distinguished from a loan, within the meaning of those statutes which prohibit an insolvent bank from receiving deposits: State v. Shove, 96 Wis. 1. Time deposits which draw interest and are not subject to withdrawal by checks are of the same character as ordinary deposits: Leaphart v. Commercial Bank, 45 S. C. 563, 55 Am. St. Rep. 800.

Power of Banks to Issue.—As will be seen later, certificates of deposit are in the nature of promissory notes, and, in the absence of express statutory prohibition, there can be no question that banks have the power to give negotiable notes and bills. This is necessarily implied from their power to contract debts in the regular course of their business: Rockwell v. Elkhorn Bank, 13 Wis. 653. Banks, therefore, have the power generally to issue certificates of deposit. The question of the authority of a bank to issue certificates of deposit has generally arisen under a statute limiting the power of a bank to issue notes and bills and put them in circulation as money. It has been claimed that, such certificates being negotiable, a bank could increase the amount of the notes and bills which it issued and which could be used as money, in violation of the statute, and that such certificates came within the general scope and purpose of the statute. It is settled, however, that certificates of deposit are not intended to circulate as money. They are not issued for that purpose, and are not within the prohibition of these statutes: Curtis v. Leavitt, 15 N. Y. 9; Barnes v. Ontario Bank, 19 N. Y. 152. There are earlier decisions opposed to this: Hazleton Coal Co. v. Megargel, 4 Pa. St. 324. The United States statutes forbid national banks to issue any other notes to circulate as money than such as are authorized by their provisions, and it was contended that certificates of deposit were within such prohibition. In rejecting this view the court, in the case of Hunt Ap-

pellant, 141 Mass. 515, said: "If the United States Revised Statutes forbade the issue of any other notes whatever than such as were therein authorized, it would be difficult to hold this certificate to be legal: *Miller v. Austen*, 13 How. 218. But assuming it [the certificate of deposit] might fall within the general designation of a note, it cannot be considered as a note intended to circulate as money, within the meaning of the statute. It requires to be indorsed. It was understood not to be payable till a certain future date. It is not in a sum adapted for general circulation as money. The form of the instrument, and the incidents above mentioned, show that it was not intended to circulate as money between individuals, and between government and individuals, for the ordinary purposes of society. . . . This method of doing business is not illegal or novel. If Congress had intended to prohibit the issue of certificates of deposit altogether, or of certificates payable on time or with interest, it would probably have said so in plain terms. The statute was passed in view of known methods of doing business." The same construction was given the statute in *Riddle v. First Nat. Bank*, 27 Fed. Rep. 503, where it was said: "That the instruments sued on are post-notes, within the prohibition of section 5183 of the Revised Statutes, is a proposition to which I cannot assent. They are mere certificates of deposit, of the usual form, issued in the ordinary course of banking business, and are not designed or adapted to circulate as money." Even where a bank has filed a certificate of a desire to withdraw its bills from circulation, and is in consequence prohibited from doing banking business, it is nevertheless liable on a certificate of deposit to an innocent depositor, who has no notice of the want of power in the bank to issue such a certificate: *Northern Bank of Illinois v. Zepp*, 28 Ill. 180. The general right of a banking corporation organized under general laws to issue interest bearing time certificates of deposit was reasoned out in the following way in the recent case of *Francois v. Lewis*, 68 Minn. 409: "Our state banks are expressly authorized, and have the power, among other matters, to carry on the business of banking, to receive deposits, and to exercise all the usual and incidental powers and privileges belonging or pertaining to such business. Their right to pay interest on deposits is expressly recognized by the statute providing for depositing in such banks the public funds, and for the payment of interest thereon. We have no statute prohibiting banks from making time certificates of deposit. Nor is it forbidden by any sound principle of public policy. . . . There being, then, no limitation, express or implied, on the power of banks to issue such certificates, and the express power having been given to them to receive deposits, pay interest thereon, and to exercise all the usual and incidental powers pertaining to the banking business, it must necessarily be implied that they have the power to make an agreement as to the terms upon which such deposits will be received, and to issue the usual

evidence of such agreement, in the form of a demand or time certificate of deposit." Where, however, a statute expressly forbids the issuance of any bill or note not payable on demand, a time certificate of deposit will be void: *Bank of Peru v. Farnsworth*, 18 Ill. 563; *Leavitt v. Palmer*, 8 N. Y. 19, 51 Am. Dec. 333. And while the issuance of a time interest bearing certificate of deposit may be illegal, yet if a bank has the power to receive deposits on interest it may do so, and the fact that a certificate has been issued will not invalidate the deposit transaction: *Pelham v. Adams*, 17 Barb. 384.

Nature of Instrument—Certificates as Promissory Notes and Their Negotiability, Generally.—A certificate of deposit is not an ordinary receipt; in fact, it contains few of the elements of a receipt. It does contain the elements of a promissory note, and the almost universal rule is that such certificates are promissory notes, to be governed in general by the same rules that control instruments of that character: *Leaphart v. Bank*, 45 S. C. 563, 55 Am. St. Rep. 800. A promissory note is an unconditional promise to pay a certain sum of money absolutely, and these essential elements, a debt of a definite sum and a promise to pay, are present in a certificate of deposit, and for this reason it is deemed a promissory note: *Renfro v. Merchants' etc. Bank*, 83 Ala. 425; *Welton v. Adams*, 4 Cal. 37, 60 Am. Dec. 579; *Falls Point Sav. Inst. v. Weedon*, 18 Md. 320, 81 Am. Dec. 603; *Drake v. Markle*, 21 Ind. 433, 83 Am. Dec. 358; *Kilgore v. Bulkley*, 14 Conn. 363; *Maxwell v. Agnew*, 21 Fla. 154; *Lynch v. Goldsmith*, 64 Ga. 42; *Bank of Peru v. Farnsworth*, 18 Ill. 563; *Laughlin v. Marshall*, 19 Ill. 390; *Gregg v. Union etc. Bank*, 87 Ind. 238; *Tripp v. Curtenius*, 36 Mich. 494, 24 Am. Rep. 610; *Pardee v. Fish*, 60 N. Y. 285, 19 Am. Rep. 176; *Cassidy v. First Nat. Bank*, 30 Minn. 86; *Mitchell v. Easton*, 87 Minn. 335. "A certificate of deposit," said the court in *Poorman v. Mills*, 35 Cal. 118, 95 Am. Dec. 90, "issued by a bank or other depository to a depositor upon his paying to the former a sum of money on general, or, as it is sometimes called, irregular, deposit, stating that the depositor has deposited that sum payable to himself or order on demand, or on return of the certificate properly indorsed, is a promissory note." From this statement and also from the certificate itself in this case it is seen that the words "promise to pay" are unnecessary in order that the certificate shall acquire the character of a promissory note. The law implies a promise to pay from the acknowledgment that the sum of money is due: *First Nat. Bank v. Greenville Nat. Bank*, 84 Tex. 40. "The differences between a certificate of deposit and a promissory note are merely formal. In substance and legal effect the two instruments are the same; and the former, notwithstanding its name and the phraseology in which the consideration is expressed, must be regarded and treated as a promissory note payable on demand": *Brummagin v. Tallant*, 29 Cal. 503, 89 Am. Dec. 61. The promise must be to pay the money absolutely. But a requirement that the certificate must be returned does not make the prom-

ise contingent, or in any manner affect the negotiability of the instrument. "The words 'on the return of this receipt' do not make it payable upon a contingency, or constitute a condition precedent to any payment," said the court in *Frank v. Wessels*, 64 N. Y. 155. "If they did, no recovery could be had without a return of the certificate. This restriction would be implied if not expressed; it is implied in every promissory note; and there is also an implied exception, on account of mistake or accident. . . . This clause is not of the essence of the contract, but is inserted for the convenience and safety of the maker": See, also, *Smilie v. Stevens*, 39 Vt. 315; *Kirkwood v. First Nat. Bank*, 40 Neb. 484, 42 Am. St. Rep. 683.

Pennsylvania seems to be the only state which holds a contrary doctrine, and denies to certificates of deposit both negotiability and the character of a promissory note. "Nothing is a promissory note," said Gibson, C. J., in *Patterson v. Poindexter*, 6 Watts & S. 227, 40 Am. Dec. 554, "in which the promise to pay is merely inferential; or, as Mr. Justice Bosanquet expressed it in *Horne v. Redfern*, 6 Scott, 267, in which there is 'no more than a simple acknowledgment of the debt, with such a promise to pay as the law will imply.' . . . The word 'payable' naturally expresses no more than that the thing of which it is predicated is the subject of payment; and where the parties have used it in its natural sense, by what authority shall we, who profess to be guided by the intention as the polar star of interpretation, say that they have used it in a different one? But though the word were taken for an express promise, it would not sustain the action, unless it were taken also for an absolute and unconditional one; and a promise to pay on the return of the certificate would have been contingent. True it is that such a contingency is no more than is implied in every promissory note; for ordinarily there can be no recovery at law where the paper is lost or mislaid, though there may be a recovery in equity, indemnity being given; but it is, to say the least, doubtful whether a chancellor could relieve against the express terms of a contract imposing nothing like a penalty." The Pennsylvania supreme court has consistently followed this decision, and has refused to bring its decisions on this question in line with those of other states: See *Lebanon Bank v. Mangan*, 28 Pa. St. 452; *Loudon Sav. etc. Soc. v. Savings Bank*, 36 Pa. St. 498, 78 Am. Dec. 390; *Dempsey v. Harm* (Pa.), 12 Atl. Rep. 27. The rules governing certificates of deposit in Pennsylvania are the same as attach to any other non-negotiable instrument. An assignee takes the same title that the original payee of the instrument had, and is subject to his equities. Having none of the characteristics of a promissory note or other negotiable instrument, its holder is entitled to none of the rights and its indorser is subject to none of the liabilities of the holders and indorsers of such instruments: See the cases cited above.

While a certificate of deposit is almost universally recognized as a promissory note payable on demand, unless the deposit is a time

deposit, yet in one important particular such certificates differ from ordinary promissory notes. A promissory note, payable on demand, is due as soon as it is given, and an action may be brought on it immediately, demand for payment being unnecessary. The courts are divided, however, as to whether this rule holds good with respect to certificates of deposit. Perhaps the weight of authority is to the effect that such certificates are not due until demand for payment is made and the certificate returned. This is the doctrine of the principal case. The reason for this is that the bank receives the money not as a real loan, but as a deposit. "No one could desire to receive money in deposit for an indefinite period with the right in the depositor to sue the next moment, and without any prior intimation that he wished to recall the loan"; Justice Bronson, in *Downes v. Phoenix Bank*, 6 Hill, 297, quoted in *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377. The supreme court of Indiana, in *Brown v. McElroy*, 52 Ind. 404, quoting from *Girard Bank v. Bank*, 39 Pa. St. 92, 80 Am. Dec. 507, said: "The liability assumed by receiving a deposit is to pay when actual demand shall be made. The engagement of a bank with its depositor is not to pay absolutely and immediately, but when payment shall be required at the banking house. It becomes a mere custodian, and is not in default or liable to respond in damages until demand has been made and payment refused. Such are the terms of the contract implied in the transaction of receiving money on deposit, terms necessary alike to the depositor and the banker. And it is only because such is the contract that the bank is not under the obligation of a common debtor to go after its customer and return the deposit wherever he may be found." In accord with these decisions are *Munger v. Albany etc. Bank*, 85 N. Y. 580; *Pardee v. Fish*, 60 N. Y. 265, 19 Am. Rep. 176; *Smiley v. Fry*, 100 N. Y. 262; *Shute v. Pacific Nat. Bank*, 136 Mass. 487; *Riddle v. First Nat. Bank*, 27 Fed. Rep. 503; *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320, 81 Am. Dec. 603. The reasoning of these cases has not met with universal approval, and good authority is found for the doctrine that certificates of deposit, being promissory notes, must be in all respects subject to the same rules to which such notes are subject. "It is difficult," said the court in *Tripp v. Curtenius*, 36 Mich. 494, 24 Am. Rep. 610, "to see why the principles applicable to promissory notes, payable on demand, should not apply to this class of paper. It is but a promise to pay money on demand, without interest, which indicates an intention to leave it on deposit but for a short period. . . . To hold such instruments to be in legal effect promissory notes payable on demand, and yet not apply the principles applicable to demand promissory notes, either because of the peculiar form of the instrument, or because issued by a firm engaged in the business of banking, would be to create a distinction unsound in principle and one not warranted by any reason or necessity that we can discover." In approving the same doctrine, the California supreme court, in *Brum-*

magin v. Tallant, 29 Cal. 503, 89 Am. Dec. 61, calls attention to the fact that "the differences between a certificate of deposit and a promissory note are merely formal. In substance and legal effect the two instruments are the same; and the former, notwithstanding its name and the phraseology in which the consideration is expressed, must be regarded and treated as a promissory note payable on demand." While this rule seems to be approved by some of the earlier Georgia cases (see *Lynch v. Goldsmith*, 64 Ga. 42), yet the the principal case, in effect, overrules these decisions, and the Georgia doctrine is the general rule which we have previously stated. To the same effect, see *Mitchell v. Easton*, 37 Minn. 335. The supreme court of Wisconsin had occasion to pass upon the question for the first time in *Curran v. Witter*, 68 Wis. 16, 60 Am. Rep. 827, and in holding that the certificate was due immediately, and hence no demand was necessary, the court said: "The cases which hold that such a certificate is not due until presented for payment, and hence that the statute of limitations does not commence to run against it until such presentation, seem to go upon the ground that the transaction is not a loan of money, creating a debt against the drawer of the certificate, but rather that it is in the nature of a bailment, upon which no cause of action accrues until demand; in other words, it is said the transaction is in contemplation of law a deposit, and not a loan. . . . With all due deference to the very able courts which have adopted this view, we cannot give our approval of the doctrine enunciated by them. We think that when a person deposits money in a bank in the usual course of business he loans it to the bank, and the bank thereby becomes his debtor to the amount of the deposit—not his bailee of the money. By the deposit the title to the money passes to the bank, and it is thereafter its money, subject to its absolute control and disposition. The depositor cannot reclaim the specific money. . . . In short, the transaction has no element of a bailment, but every essential element of a loan of money." In *Hunt v. Divine*, 37 Ill. 187, on a certificate of deposit made payable at a particular date, it was held that no demand was necessary. And by way of dictum the court said that certificates payable on demand were due immediately, and no demand was necessary before a recovery. So far as certificates of deposit payable on demand are concerned, the Illinois courts seem to have receded from this position and now occupy a somewhat half-way position, holding that, in view of the manner in which banks ordinarily transact business, such certificates are not due until demand is made, or until a sufficient time has elapsed to raise a presumption that the paper is past due: *Auten v. Crahan*, 81 Ill. App. 502. Michigan seems to have somewhat repented of her earlier decisions, and in *Birch v. Fisher*, 51 Mich. 36, said that if "the question were an open one, we should be inclined to think that such a certificate does not become due until payment is demanded"; and held that a demand certificate of deposit was not overdue paper

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until a reasonable time after the deposit had been made. Thus, Illinois and Michigan hold neither of the extreme positions, and in neither state is demand necessary in order that a certificate of deposit shall be due, and such a certificate is not due immediately so as to make it dishonored paper.

Important results follow, whichever of the above doctrines are held. If these certificates are not due until after a demand is made for payment, then the statute of limitations does not commence to run against the depositor's claim until after demand has been made: See *Riddle v. First Nat. Bank*, 27 Fed. Rep. 503; *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320, 81 Am. Dec. 603; *Howell v. Adams*, 68 N. Y. 314; *Smiley v. Fry*, 100 N. Y. 262; *McGough v. Jamison*, 107 Pa. St. 386. On the other hand, where demand is not necessary and the certificate is deemed to be due immediately, the statute of limitations runs from the date of the certificate: See *Brummagin v. Tallant*, 29 Cal. 503, 89 Am. Dec. 61; *Mitchell v. Easton*, 37 Minn. 335; *Curran v. Witter*, 68 Wis. 16, 60 Am. Rep. 827. These two doctrines are important also in determining when such certificates fall due so as to make them dishonored paper. Where deposits are time deposits and the certificates are payable at a certain date, they are due at that time, and subsequent holders take them with the same disabilities as the holders of any overdue paper. Hence where from the face of the certificate it appeared that it was payable three months after date, it was held to be a time certificate, and if transferred after the expiration of that period, the purchaser took it as then overdue, and subject to all defenses in favor of the maker which could have been made had it remained in the hands of the original payee. And this is true though it has not been indorsed and returned as required by the certificate: *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71, 33 Am. St. Rep. 618; *Kirkwood v. First Nat. Bank*, 40 Neb. 484, 42 Am. St. Rep. 683.

In those states where a certificate of deposit is not due until demand is made for its payment, it would seem that, logically, a certificate could never be overdue until such time, even though it might be months or even years before any demand was made, and, therefore, any person taking such certificate before a demand for payment had been made, and consequently before it was overdue, would take it free from any equities to which it might be subject in the hands of the original payee. Such seems to be the doctrine of the principal case, where a garnishment of the deposit was held not to be binding on the bank as against a bona fide holder of the certificate who presented it for payment. The purchaser of the certificate was protected against the equities existing against the payee. The rule was adhered to strictly in *National Bank v. Washington etc. Bank*, 5 Hun, 605, where the certificate of deposit, payable on demand, was not presented for seven years, when it was presented by a holder other than the payee, the deposit in the meantime having been paid to the original depositor. It was contended that the

certificate, being payable immediately, should be presumed to be dishonored after the lapse of an unreasonable time, and that the assignee took it subject to all equities. But the court replied: "We think not. The very nature of the instrument and the ordinary modes of business show that a certificate of deposit, like a deposit credited in a pass-book, is intended to represent moneys actually left with the bank for safekeeping, which are to be retained until the depositor actually demands them. Such a certificate is not dishonored until presented." This decision is certainly correct if the rule is followed to its logical conclusion, but the cases generally do not support such an extreme doctrine, the general view being that a certificate of deposit must be presented within a reasonable time or it will be presumed that the certificate is overdue and hence a holder of it subject to equities. And in those jurisdictions where such certificates are held to be due immediately, a reasonable time after their date is allowed before the certificate is considered as overdue paper. In *Auten v. Crahan*, 81 Ill. App. 502, four days were held not to be such a length of time as to make the certificate overdue. An assignment within two days after the certificate had been issued was, in *Howe v. Hartness*, 11 Ohio St. 449, 78 Am. Dec. 312, regarded as having been made before the paper was overdue, and that the assignee took the certificate free from all equities against the original payee, and the deposit was, therefore, not subject to attachment by the creditors of the original payee. Six years after the deposit had been made was deemed sufficient to stamp the certificate with the character of overdue paper, in *Gregg v. Union County Nat. Bank*, 87 Ind. 238. A period of two years was given the same effect in *Tripp v. Curtenius*, 36 Mich. 494, 24 Am. Rep. 610. But the same court, in *Birch v. Fisher*, 51 Mich. 36, considered the lapse of thirty-one days from the date of the certificate as not enough to raise the presumption that it was dishonored paper, though the paper was due at its date.

As we have already stated, certificates of deposit are usually negotiable, the same as promissory notes. They are negotiable if they contain words of negotiability, though the absence of such words will deprive them of that character: *Maxwell v. Agnew*, 21 Fla. 154; *Carey v. McDougald*, 7 Ga. 84; *Lynch v. Goldsmith*, 64 Ga. 42; *Miller v. Austen*, 13 How. 218; *Birch v. Fisher*, 51 Mich. 36; *Fultz v. Walters*, 2 Mont. 165; *Pardee v. Fish*, 60 N. Y. 265, 19 Am. Rep. 176; *Johnson v. Henderson*, 78 N. C. 227; *Curran v. Witter*, 68 Wis. 16, 60 Am. Rep. 827; *Welton v. Adams*, 4 Cal. 37, 60 Am. Dec. 579; *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320, 81 Am. Dec. 603; *Kirkwood v. First Nat. Bank*, 40 Neb. 484, 42 Am. St. Rep. 683; *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377; *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145. As we have already seen, Pennsylvania denies negotiability to a certificate of deposit: See the cases previously cited. A certificate of deposit payable in "current funds" is not negotiable where it is held that such words do not

import a payment in money: *National State Bank v. Ringel*, 51 Ind. 393; *Johnson v. Henderson*, 76 N. C. 227. The authorities are divided on this question, however, and the prevailing doctrine now is that the negotiability of a certificate is not destroyed by the use of these words or words of similar meaning: *Frank v. Wessels*, 64 N. Y. 155; *Howe v. Hartness etc. Co.*, 11 Ohio St. 449, 78 Am. Dec. 312; *Citizens' Nat. Bank v. Brown*, 45 Ohio St. 39, 4 Am. St. Rep. 526. See *Blood v. Northup*, 1 Kan. 28, where the earlier authorities on both sides of the question are collected. The tendency is clearly in the direction of holding that the words "currency" or "current funds," when plainly used to denote money, are to be taken in that meaning, and the negotiable character of a certificate of deposit is not destroyed by the use of such words. This tendency is apparent from the case of *Klauber v. Biggerstaff*, 47 Wis. 551, 32 Am. Rep. 773. The Wisconsin court, when confronted with some earlier decisions holding that the term "current funds" destroyed the negotiability of certificates of deposit for the reason that they were not payable in money, said: "These cases were decided, respectively, in 1862, 1863, and 1864, when the paper money, circulating in the state de facto, was of a very heterogeneous character. How much influence this fact had on those decisions, or on similar decisions elsewhere, it is impossible to say. It is, perhaps, not altogether an uncommon infirmity of judicial rules that they are made in view of exceptional conditions of things presently existing. Passing evils or exigencies should have little weight in general rules of decisions. Judicial rules ought properly to be based upon the general condition of society, and to be broad enough to meet occasional derangements incident to it. . . . The true and only test in this respect of the question whether an instrument be negotiable under the statute of Anne is always whether it is payable in money. Money is a generic and comprehensive term. It is not a synonym with coin. It includes coin, but is not confined to it. It includes whatever is lawfully and actually current in buying and selling, of the value and as the equivalent of coin. By universal consent, under the sanction of all courts everywhere, or almost everywhere, bank-notes lawfully issued, actually current at par in lieu of coin, are money. 'The whole fallacy of the argument,' says Lord Mansfield [in *Miller v. Race*, 1 Burr. 452], 'turns upon comparing bank-notes to what they do not resemble and what they ought not to be compared to, viz., to goods, or to securities, or documents for debts.' Now, they are not goods, not securities, nor documents for debts, nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash." The more recent case of *Kirkwood v. First Nat. Bank*, 40 Neb. 484, 42 Am. St. Rep. 683, shows the same tendency and indicates what is

the better rule. The negotiability of the certificate of deposit in this case was assailed because it contained the words "in current funds." In sustaining its negotiability the court said: "We are aware that many courts have held that such a clause does not require payment in money and destroys the negotiability of the instrument. The cases so holding are either cases arising at a time when many forms of bank-notes and bills were in use, varying in their values, or cases decided upon the authority of that class without regard to changed conditions. With regard to existing conditions, we think the supreme court of the United States has declared the law correctly in *Bull v. Bank of Kasson*, 123 U. S. 105, as follows: 'Within a few years, commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice of drawers of bills of exchange or checks, or makers of promissory notes, to indicate whether the same are to be paid in gold or silver, or in such notes; and the term "current funds" has been used to designate any of these, all being current, and declared by positive enactment to be legal tender. It was intended to cover whatever was receivable and current, by law, as money, whether in the form of notes or coin. Thus construed, we do not think the negotiability of the paper in question was impaired by the insertion of these words.'" The negotiable character of a certificate of deposit is not affected by the fact that a demand is necessary before an action can be maintained thereon: *Pardee v. Fish*, 60 N. Y. 265, 19 Am. Rep. 176; *Bellevue Falls Bank v. Rutland County Bank*, 49 Vt. 377.

Certificates of deposit being negotiable, the usual incidents that pertain to negotiable paper are attached to them. It is unnecessary to discuss in detail the rights and obligations of the parties that spring from the negotiability of these certificates. Some of these questions have already been touched upon. A bona fide purchaser of such certificates before maturity or before they are overdue is protected to the same extent as an innocent holder of other negotiable paper: *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71, 33 Am. St. Rep. 618; *Kirkwood v. First Nat. Bank*, 40 Neb. 484, 42 Am. St. Rep. 663. If the certificate can be put in circulation by mere delivery, as is frequently the case, one who takes it acquires an absolute property in it, and may recover on it, although it was fraudulently put in circulation or had been stolen, provided he takes it in good faith and for a valuable consideration: *Farmers' etc. Bank v. Gleason*, 75 Ill. App. 251. One who is a holder of a certificate of deposit "payable in certain notes," which, by reason of such words, is rendered non-negotiable, does not become an innocent holder freed from the equities existing between the original parties, where the bank which issued the certificate issued a duplicate and, through inadvertence, the words "payable in certain notes" were omitted and the words "payable in current funds" were substituted: *Niblack v. Cosler*, 80 Fed. Rep. 503. A certificate of

deposit may be transferred without indorsement by the payee, and such assignment is effectual to pass the property therein, if so intended: *Shanklin v. Madison County*, 21 Ohio St. 575; *Cassidy v. First Nat. Bank*, 30 Minn. 86. This is particularly true where there has been an indorsement in blank: *Poorman v. Mills*, 35 Cal. 118, 95 Am. Dec. 90. And one who is the real owner of a certificate of deposit may, by a bill in equity, compel the payee or other proper party to indorse the certificate: *Fultz v. Walters*, 2 Mont. 165. Mere possession, however, of an unindorsed certificate, payable to the order of the payee named therein, is not even prima facie evidence of title in the holder as against such payee: *Vastine v. Willing*, 45 Mo. 89, 100 Am. Dec. 347. And in the absence of an indorsement or assignment of the certificate by the payee, another, to whom possession of the certificate is intrusted, cannot, by a fraudulent indorsement, convey title even to a bona fide holder for value: *McCarville v. Lynch*, 14 Misc. 174, 35 N. Y. Supp. 383. Indorsers of negotiable certificates of deposit are generally entitled to the same rights and subject to the same liabilities as indorsers of other negotiable instruments: *Carey v. McDougald*, 7 Ga. 84; *Bean v. Briggs*, 1 Iowa, 488, 63 Am. Dec. 464; *Cate v. Patterson*, 25 Mich. 191; *Johnson v. Henderson*, 76 N. C. 227; *Mills v. Barney*, 22 Cal. 240; *Kilgore v. Bulkley*, 14 Conn. 363. This, as we have already seen, is not the rule in Pennsylvania, a certificate of deposit being regarded as negotiable merely for purposes of transfer, and the indorsement of a certificate by a payee has the effect of transferring the payee's title merely and does not render him liable as an indorser to the holder: *Patterson v. Poindexter*, 6 Watts & S. 227, 40 Am. Dec. 554; *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 86 Pa. St. 498, 78 Am. Dec. 390; *Charnley v. Dulles*, 8 Watts & S. 353. Where a certificate is not negotiable, an indorsement by the payee creates no liability upon the indorser as such, but only passes his interest in the contract: *Easton v. Hyde*, 13 Minn. 83. If the certificate is negotiable, however, which is the usual case, an indorsement renders one liable as an indorser. "Every reason exists," said the court in *Miller v. Austen*, 13 How. 218, "why the indorser of this paper should be held responsible to his indorsee that can prevail in cases where the paper indorsed is in the ordinary form of a promissory note." Where the certificate of deposit is not due until demand is made for payment, which is the general rule, a holder is not chargeable with neglect for omitting to make such demand within any particular time. "The certificate," said the court in *Pardee v. Fish*, 60 N. Y. 265, 19 Am. Rep. 176, "was a continuing security as between indorsee and indorser; and the latter was liable until an actual demand was made, and the holder cannot be chargeable with neglect because the demand was not made within any specified time." The time within which demand for payment must be made, upon a certificate of deposit payable on demand, has been regulated by statute in some of the states, as,

for example, in Minnesota, where sixty days is allowed: *Mitchell v. Boston*, 37 Minn. 335. Generally, demand must be made within a reasonable time. On time certificates of deposit, however, demand must be made at the expiration of time for which the deposit is made: *Towle v. Stern*, 67 Minn. 370. At the expiration of such time the paper is due, and must be presented then in order to hold an indorser liable for its nonpayment. An indorser of certificates of this character is entitled to notice of nonpayment or he cannot be held liable on his contract of indorsement. The same notice is required as that to an indorser of any other negotiable instrument: *Gilbert v. Seymour*, 44 Ga. 63. But where the indorser, at the time of negotiating the instrument, intends the indorsement to transfer title only and not to impose any liability on him, and the indorsee is aware of such intention, that construction of the indorsement will control as between these two parties: *Lynch v. Goldsmith*, 64 Ga. 42. Such a rule would not prevail, however, in those jurisdictions where parol evidence was inadmissible to vary the legal effect of an indorsement: *Citizens' Bank v. Jones*, 121 Cal. 30. An indorser of a time certificate is entitled to notice only after the expiration of the time for which the deposit has been made. And where a certificate is by its terms payable in twelve months, or within six months if desired, the certificate does not mature until twelve months after its date, and the option for payment at the end of six months was solely for the benefit of the payee, to be availed of at his election. This privilege passed to the indorsee upon indorsement. The indorser is not entitled to notice of nonpayment until after the maturity of the instrument, which is twelve months, and an oral agreement to give notice to the indorser in six months is unavailing: *Citizens' Bank v. Jones*, 121 Cal. 30.

Rights of Parties Respecting Payment of Certificate.—A certificate of deposit made payable "on the return of the certificate" is payable at the place where the bank is located, and an action to recover on the certificate should be prosecuted there, and not at the place where the banker resides: *Sanborn v. Smith*, 44 Iowa, 152. An indorsee of a certificate, who holds the legal title thereto, may sue in his own name as the real party in interest: *Seybold v. Grand Forks Nat. Bank*, 5 N. Dak. 460. Indorsement is not always necessary to entitle a party to receive payment, even though the certificate states that it is payable on its return properly indorsed. The payee of the certificate is entitled to receive payment whether he indorses it or not, for an indorsement in such a case is an idle act accomplishing no useful purpose. An indorsement can be required only when some one other than the payee is seeking to collect the amount deposited, and this is for the protection of the bank issuing the certificate: *Cornwall v. McKinney* (S. Dak.), 80 N. W. Rep. 171; *Kirkwood v. First Nat. Bank*, 40 Neb. 484, 42 Am. St. Rep. 683. The bank, generally, has the right to pay an indorsee of a certificate of deposit: *Weirick v. Mahoning County Bank*, 16

Ohio St. 296. And the bank is usually not required to ascertain whether the assignment was made in good faith or not. Yet if both the payee of the certificate and an assignee claim the fund on deposit, the bank may be enjoined from paying the money until after the parties have settled as between themselves to whom the money should be paid: *Springfield etc. Ins. Co. v. Peck*, 102 Ill. 265. The bank issuing the certificate is required to pay to an indorsee in good faith: *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320, 81 Am. Dec. 603. If the certificate is acquired after its maturity, the holder takes it subject to equities, and the bank is entitled to any setoff to which it would have been entitled if the certificate had remained in the hands of the original payee: *Tripp v. Curtenius*, 36 Mich. 494, 24 Am. Rep. 610. The bank issuing the certificate has the right to demand that the certificate be returned before it pays the same: *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320, 81 Am. Dec. 603. This is especially true where other parties than the one suing to recover the deposit claim to be the legal and equitable owners of the certificate of deposit: *Read v. Marine Bank*, 59 Hun, 578. At common law, it would seem that the right of the bank to refuse payment without a surrender of the certificate was absolute, and, if the certificate were lost, the only remedy of the party was in equity: *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320, 81 Am. Dec. 603. However, under the liberal modern procedure, the return of the certificate is not a condition precedent to the right to recover, where the certificate has been lost or destroyed. The bank can be adequately protected, if indemnity is given it against all future claims under the certificate. Accordingly, a recovery is permitted where indemnity is given: *Welton v. Adams*, 4 Cal. 37, 60 Am. Dec. 579; *Frank v. Wessels*, 64 N. Y. 155. There is some conflict in the cases as to whether the right to require indemnity exists when it is satisfactorily shown that the certificate was lost after maturity, or that it was not indorsed, or that it is actually destroyed. In requiring indemnity in such a case the California supreme court, in *Welton v. Adams*, 4 Cal. 37, 60 Am. Dec. 579, said: "It is undeniable that upon the payment of a note or bill the maker or acceptor has a right to its possession, as a voucher of its payment. Can this right be taken away without its equivalent? It is said that proof of its destruction is a sufficient assurance that it can never afterward appear. But when we reflect upon the uncertainty and fallibility of all human testimony, it looks unjust to force the risk of its reappearance upon a party totally innocent of fault, and who has not bargained with a view to any mischance which may in the future result to his injury. I think there never can be to him that assurance of the loss or destruction of the paper as should force him, against his will, to take the peril, either of defending an action thereafter, or of repaying the amount. The negligence or misfortune of the holder ought not to give him the right of casting such a burden upon the maker. . . . I am satis-

ded that the best rule is to require the indemnity in all cases, whether a bill or note be lost or destroyed. It may in some cases operate as a great inconvenience, and may even produce hardship, but so does nearly every mischance or misfortune. We only determine to let it be visited where it is properly due. A different rule would produce equal or more hardship and inconvenience where it is the least merited." This rule is certainly just, and we believe the better one. The same rule prevails in New York by virtue of statutory enactment, at least so far as negotiability of the certificate is concerned: *Frank v. Wessels*, 64 N. Y. 155. A different rule prevails in Ohio, where, if a negotiable certificate of deposit is lost by the payee before indorsement by him, he may sue thereon without tendering an indemnity bond against future liability: *Citizens' Nat. Bank v. Brown*, 45 Ohio St. 39, 4 Am. St. Rep. 526. This seems to be the general rule, that if the maker can be subjected to no liability, because the instrument is non-negotiable, or, if payable to order, because it is not indorsed, or because it is lost after maturity, or because it is destroyed, in such case indemnity will not be required: See, further, *Kirkwood v. First Nat. Bank*, 40 Neb. 484, 42 Am. St. Rep. 683; *National State Bank v. Ringel*, 51 Ind. 393. Where the certificate is wrongfully in the hands of a third party who claims it adversely to the payee, the payee is not entitled to recover the deposit even upon the giving of indemnity to protect the bank: *Read v. Marine Bank*, 136 N. Y. 454, 32 Am. St. Rep. 758.

Where a certificate of deposit is issued payable to the order of the depositor or his wife, it seems that after the depositor's death the wife cannot demand payment of the deposit upon a return of the certificate: *Second Nat. Bank v. Wrightson*, 63 Md. 81. The reason for this is that the title to the deposit is in the depositor, and the only right which the wife has to draw out the money is under the authority conferred upon her by her husband, she acting as his agent. Her power being that of an agent merely, it is revoked by the death of her husband: See *Murray v. Cannon*, 41 Md. 466. Where the holder of the certificate is dead, the payee cannot recover the deposit, when the certificate is in the hands of the representatives of the deceased claiming title to it: *Read v. Marine Bank*, 136 N. Y. 454, 32 Am. St. Rep. 758.

If there is a discrepancy between the amount stated in the body of a certificate and the amount stated in the margin, or at the bottom, the amount stated in the body of the instrument will control: *Payne v. Clark*, 19 Mo. 152, 59 Am. Dec. 333. A time certificate drawing interest will continue to bear interest after maturity as well as before: *Payne v. Clark*, 23 Mo. 259; *Cordell v. First Nat. Bank*, 64 Mo. 600. Where an illiterate person held a certificate of deposit for four hundred dollars, payable to himself, and unknown to him some person secured one hundred dollars on the certificate, which payment was indorsed on the certificate, and later upon re-

ceiving one hundred dollars with a new certificate for two hundred dollars, and no objection to the new certificate was made until eleven months later, it was held that the depositor was not, as a matter of law, guilty of such negligence in failing to discover and inform the bank of the unauthorized payment as to estop him from asserting his claim for the amount thereof: *Devine v. Bank*, 91 Wis. 68. An action may be maintained by the payee of a certificate of deposit upon a bond given to the payee, conditioned that the bank shall safely keep and account for all moneys deposited by said payee, and on demand pay over, upon a proper warrant, check, or other proper direction, all moneys so deposited, without the necessity of presenting the certificate to the bank for payment, where the property of the bank is in the hands of a receiver in insolvency proceedings: *Board etc. of Commrs. v. Irish-American Bank*, 68 Minn. 470.

Questions have arisen as to right of a bank which has paid its own certificate of deposit on a forged indorsement to recover the amount paid. There can be no doubt that, if the certificate comes to the bank through the hands of bona fide innocent parties, the indorsement being forged, the bank must lose the amount paid on the certificate, for the reason that the bank issuing the certificate has the means of verifying the signature, and can protect itself by such verification before payment: *State Nat. Bank v. Freedmen's Sav. Co.*, 2 Dill. 11; *Stout v. Benoit*, 39 Mo. 277, 90 Am. Dec. 466. The party receiving payment must be a bona fide holder: *Merchants' Bank v. Marine Bank*, 3 Gill, 96, 43 Am. Dec. 300. But where a forged certificate is paid through a clearing-house, under circumstances allowing the bank no previous opportunity for inspection, the bank may recover the amount paid, if it uses due diligence of making inspection as soon as it has the opportunity, and in giving notice of the forgery. But if it is negligent in making such inspection, and by such negligence the party receiving payment is prejudiced, the bank cannot recover: *Allen v. Fourth Nat. Bank*, 59 N. Y. 12. Also, in cases where the depositor cannot write, and the bank's only means of identification is by a description of the depositor which it has taken, the bank issuing the certificate has a right to rely upon the identification of one claiming to be the depositor by another bank, to whom the money has been paid, and can recover from such bank upon discovering the forgery: *State Nat. Bank v. Freedmen's Sav. Co.*, 2 Dill. 11. In cases of forgery, the depositor himself still retains the right to his deposit, unless he has been guilty of some negligent conduct which induced the bank to pay the certificate on the forged indorsement: *First Nat. Bank v. Bremer*, 7 Ind. App. 685, 52 Am. St. Rep. 461. In such cases, the bank is not relieved from its liability to the depositor.

Liability of Bank on Certificates of Deposit.—We have already treated some of the questions relating to the liability of the bank which

issues a certificate of deposit under the subjects of negotiability and the rights of the parties as to payment. In those jurisdictions where it is held that such a certificate is a negotiable promissory note, the bank's liability is measured by the same standard as the liability of any other maker of a promissory note. A bona fide holder of a certificate may hold the bank liable even though no money was deposited by the original payee: *Mitchell v. Easton*, 37 Minn. 335; *Barnes v. Ontario Bank*, 19 N. Y. 152; *Holland Trust Co. v. Waddell*, 75 Hun, 104. This is true where the agents of the bank act fraudulently, but within the apparent scope of their powers: *Citizens' Sav. Bank v. Blakesley*, 42 Ohio St. 645. It is no defense on the part of the bank that the money which was deposited for the use of another was to be used in an illegal transaction: *Armstrong v. American etc. Nat. Bank*, 133 U. S. 433. As against a bona fide holder of the certificate, it is no defense that the money has been paid to the original payee: *National Bank v. Washington County Nat. Bank*, 5 Hun, 605. In this case the transfer of the certificate had been made seven years after it was issued. Where money is deposited by an agent in behalf of his principal to whom the deposit is unknown, the principal may ratify the transaction and the bank will be liable to him as the payee of the certificate. And the fact that the bank has secured possession of the certificate by a payment to the agent, upon the agent's indorsement, does not relieve it from liability to the principal, even though the agent had, at the time of making the deposit, indicated in a private memorandum-book of the bank that the certificate should be paid upon being indorsed in the name of the principal by him as agent: *Honig v. Pacific Bank*, 73 Cal. 464. In *Walker v. State Trust Co.*, 24 Misc. 498, 53 N. Y. Supp. 849, a certificate of deposit was issued in the name of an infant to her "special guardian." The deposit was made pursuant to a court order to await the further order of the court. The bank paid out portions of the deposit at various times to the guardian on his order, and this action was brought by the infant to recover the entire amount of the deposit as shown by the original certificate. It was claimed that, the money having been deposited in pursuance of an order of court to await the court's further orders, the guardian had no authority to withdraw it. The bank, however, had no notice of this order, and the deposit was in fact payable on demand, and the court held that the bank was not liable to the infant on the certificate for having paid out money on the order of the guardian.

Cases have frequently arisen where certificates of deposit have been fraudulently issued by the officers or agents of a bank, and the certificates have been signed by officers acting as individuals, and not as acting for the bank, and the question arises as to whether the bank is liable on the certificates in such cases. It would seem that if a deposit is taken by a bank over its counter, and the transaction is clearly intended to be a deposit in the bank, and nothing

to the contrary is said or intimated, the receiving officer acting within the apparent scope of his authority, that the bank should be held liable, whatever may be the form of the certificate of deposit which is given to the depositor. In *Lemon v. Fox*, 21 Kan. 152, where the bank was a partnership one, the certificate of deposit in question was claimed to be the individual obligation of one of the partners on which the bank was not liable. To this contention the court, through Justice Brewer, said: "Where transactions pertaining to certain kinds of business are had in a building devoted to that business, with one of the firm carrying on that business in the ordinary way in which such transactions are carried on, it will be presumed that such transactions are with the firm, and not with the individual partner alone. . . . Just so it is with partners running and owning a bank. All are responsible for moneys received for deposit in the usual course of business over the counter, unless some notice to the contrary is given to the depositor, and that notwithstanding the fact that the partner actually receiving the money intends to appropriate it to his own use, and does in fact so appropriate it. Again, it is said that the form of the certificate indicated a personal transaction, and that the personal signature of the cashier, without the addition of the word 'cashier,' does not bind the bank. But who determines the form of the certificate—the bank, or the depositor? . . . Is not the form of the certificate a matter of private regulation by the bank, of which the depositor knows nothing, and which, without some express notice to him, in no manner affects his rights? . . . While the addition of the word 'cashier' may be significant or even essential to the signature of one who as a mere agent attempts to bind a corporate bank by an official act, yet no such rule obtains where the managing member of the firm engaged in the business of banking, receiving money on deposit in the usual course of the business of the firm, issues a certificate in the name of the firm with merely his individual signature. The omission of the word 'cashier,' or 'managing partner,' or any other descriptive term, does not avoid the instrument or operate to release the firm from liability on a certificate issued in the regular course of business by the partner authorized to receive money on deposit and transact the business of the firm generally." This rule is not only reasonable and just, but a contrary doctrine would furnish innumerable opportunities for fraud. A bank should not be permitted to set up as a defense the fraud of its own officers who have acted within the apparent scope of their employment: *Steckel v. First Nat. Bank*, 93 Pa. St. 376, 39 Am. Rep. 758; *Ziegler v. First Nat. Bank*, 96 Pa. St. 393. See, also, *Jumper v. Bank*, 48 S. O. 430. In *Coleman v. First Nat. Bank*, 53 N. Y. 388, the doctrine of constructive notice was sought to be applied to a depositor in a bank whose certificate of deposit was signed by the president as an individual, and it was contended that the depositor had notice from this cer-

tificate that he had not deposited money in the bank, notwithstanding the money had been paid over the counter of the bank in the usual course of business. But the court replied to this: "If the plaintiff had examined the certificate, he would have been apprised of the fact that it purported to be the individual obligation of Van Campen [the president]. But he did not do so. He had a right to suppose that it was the proper acknowledgment of the bank with whom the money was deposited. The doctrine of constructive notice, from the possession of the certificate, would be misapplied if, in this case, it should be held to exempt the bank from liability." The same rule was applied in the similar case of *West v. First Nat. Bank*, 20 Hun, 408. And in *First Nat. Bank v. Brooks*, 22 Ill. App. 238, where the terms of a certificate of deposit were such as to make the contract ultra vires, it was held that this was no defense against the depositor who had taken the certificate in good faith.

There are cases, however, in which a bank is not liable to a depositor on a certificate of deposit which does not purport to be its obligation. Such a case is *First Nat. Bank v. Williams*, 100 Pa. St. 123, 45 Am. Rep. 365. In this case the depositor, who wished to deposit money on interest, was told that the bank could not pay interest, but that he could have a certificate which would bear interest, and was given a certificate signed by B. & Co. He knew he was getting the certificate of B. & Co. instead of that of the bank, and the bank was held not to be liable to him. In *Shields v. Niagara Sav. Bank*, 3 Hun, 477, the depositor acted upon the certificate as the private obligation of the signer, and it was held that he was estopped from claiming that the bank was liable on it. If the deposit is not made in the regular course of business with the officers authorized to receive deposits, but is made privately with an officer (here the president) who has no authority to receive deposits, the bank cannot be held liable: *Bickley v. Commercial Bank*, 39 S. C. 281, 39 Am. St. Rep. 721. A banking corporation cannot be held liable for anything done by promoters before its existence. Hence a bank is not liable on a certificate of deposit issued before it was organized by a person as its cashier, even though it was contemplated to have such person as cashier when the bank was organized: *Long v. Citizens' Bank*, 8 Utah, 104.

LIPPMAN v. AETNA INSURANCE COMPANY.

[108 GEORGIA, 291.]

INSURANCE—ORAL WAIVER OF CONDITIONS—POWER OF AGENT.—Where a contract of insurance provides that the agent may change the conditions expressed in the policy by writing thereon, such agent having the general powers of the company over such changes, the company is bound when the agent, having notice, agrees to the changed condition. But when the power of the agent over such changes is limited, so that no change by the agent can be effected unless done by a writing on the policy, the company is not bound by changed conditions, unless the change has been made in accordance with the terms prescribed in the contract.

INSURANCE—ORAL WAIVER OF CONDITIONS—CONSTRUCTION OF POLICY.—Where an insurance policy provides that it shall be void if the insured procures other insurance on the same property, "unless otherwise provided by agreement indorsed hereon or added hereto," and another clause in the contract provides that no agent "shall have power to waive any provision or condition of this policy, except as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon, or attached hereto, nor shall any privilege or permission affecting the insurance under the policy exist or be claimed by the insured unless so written or attached," a mere oral permission by the agent to the insured to take out additional insurance is not binding on the company.

Greer & Felton and Hall & Wimberly, for the plaintiff.

King & Spalding and J. W. Haygood, for the defendant.

³⁸² **LITTLE, J.** Lippman, suing for the use of Lewis and others, brought suit on a policy of fire insurance. Attached to and forming a part of the policy was a printed slip containing these words: "No other concurrent insurance permitted." This was signed by the agent. Another clause of the policy is in the following language: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on the property covered in whole or in part by this policy." Still another clause reads as follows: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon, or added hereto. And no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement

indorsed hereon or added hereto; and as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission ³⁹³ affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." On the trial of the case, plaintiff offered the evidence of Lippman to prove that he informed Hill, the defendant's agent who wrote the insurance, that in the fall of the year he (Lippman) would increase his stock of goods, and would then want additional insurance; that the agent consented to this, and told witness that when he wanted such additional insurance, to come back to him and get it. The plaintiff also proposed to prove by Lippman that subsequently to the issue of the policy, and after he had largely increased the stock of goods insured, he saw the agent of the company and told him that he intended to take another policy in another company. The agent said that was all right. He then went to the agent of the Continental Insurance Company, and took an additional policy on the same goods for three thousand dollars, and he relied on the consent of the agent in taking out the latter policy. All of this evidence of Lippman was objected to, and ruled out by the court, and the plaintiff excepted. No question was made on the amount of the loss sustained, nor the transfer of the policy to the usees. The trial judge, on motion, nonsuited the plaintiff; and the sole question to be determined is, whether the coinsurance obtained by the plaintiff voided the policy. It is contended for the plaintiff in error that, notwithstanding the stipulations made in the policy that the procurement of other insurance on the same goods unless agreed to in writing made upon the policy renders the contract void, nevertheless, if the agent of the company have notice of the intention to get additional insurance and consent thereto orally, in the absence of fraud, such an agreement binds the company.

It is provided by section 2089 of the Civil Code that a contract of fire insurance, to be binding, must be made in writing; and in repeated adjudications by this court it has been held that an agreement to alter such a contract must also be in writing: *Augusta etc. Ry. Co. v. Smith etc. Co.*, 106 Ga. 867; *Simonton v. Liverpool etc. Ins. Co.*, 51 Ga. 76. And in the case of *Mitchell v. Universal Life Ins. Co.*, 54 Ga. 289, it was held that a contract which is required by ³⁹⁴ law to be in writ-

ing cannot be shown to have been altered by parol after its execution. The contract upon which the plaintiff based his suit expressly declared that no concurrent insurance was permitted; and also that, unless by an agreement indorsed on the policy, it should be void if the insured procured any other insurance on the same property. These stipulations were as much a part of the contract as the promise to pay in case of loss. The effect of the evidence of Lippman, if admitted, would have been to change the terms of the contract; and it would seem, from the provisions of the code and the authorities cited, that as a matter of law, in order to be valid and binding and to become a part of the contract, the alteration made should have been in writing in order to render the contract valid. But, waiving an express adjudication of this point, we come to consider the proposition urged for the plaintiff, that, notwithstanding the clause of the contract requiring consent to additional insurance to be manifested in writing on the policy, if without such writing the agent of the insurance company consents to additional insurance, the policy is not avoided. We are referred to the case of Carrugi v. Atlantic Fire Ins. Co., 40 Ga. 135, 2 Am. Rep. 567, in which this court ruled that, where a policy of insurance contained a clause to the effect that if any subsequent insurance should be thereafter made on the same property and not consented to by the company in writing, the policy shall be null and void, and the policy-holder notified the agent that he would get additional insurance, the agent consented, and the insured acted on that consent and obtained such additional insurance, the policy was not void, although the consent of the agent was not in writing; and also to the case of City Fire Ins. Co. v. Carrugi, 41 Ga. 660, in which it was ruled that if the agent of an insurance company in fact receives notice of a prior insurance from the assured, and, notwithstanding such notice, issues a policy on the same property and receives the premium agreed on, the policy is not void because such notice of such prior insurance is not indorsed in writing upon the policy as required by its conditions. While it may be said, on a casual reading, that the principles ruled in these two cases are authority in this case for the plaintiff in ³⁹⁵ error, in fact they are not. The contracts of insurance adjudicated in those cases contained this clause: "If any other insurance has been, or shall hereafter be, made upon said property and not consented to by this company in writing, this policy shall be null and void." The rulings of the court were based on the proposition that the insurance com-

pany was a foreign corporation and represented here by its general agent for the purpose of taking and receiving risks, and that those who dealt with the agent had the right to consider him authorized to do and consent to all acts within the scope of the business; that consent to a prior or subsequent insurance was within that scope; and if the agent in fact consented and the insured acted on that consent, it would be a fraud on the insured for the company to set up that they had stipulated that such consent must be in writing. It is true that the policy in the case which we are now considering did provide that other contracts of insurance on the same property should void the policy unless it was, by agreement, indorsed on the policy; and in so far the conditions of the two policies may be regarded as the same. But the contract of insurance which is being here considered contains another and a distinct clause not incorporated in the contracts passed upon in *Carrugi v. Atlantic Fire Ins. Co.*, 40 Ga. 135, 2 Am. Rep. 567, and *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660, which is, that no officer, agent, or other representative of this company shall have the power to waive any provisions or conditions of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or other representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached. Assuming, as we must, that the law was correctly determined and applied in the *Carrugi* cases, we find that an entirely distinct condition in relation to additional insurance is incorporated in this contract; and not only is it a distinct condition, but it is one which restricts and limits the power of any agent of the company ²⁰⁰ to waive or change the terms of the original contract, unless he does so in writing; and this restriction and limitation is a part of the contract which the assured is now seeking to enforce.

The question is not, therefore, whether the company had notice of another insurance, but, having prescribed that no agent had the power to consent to additional insurance unless the same was manifested by writing on the policy, what is the effect when the agent consents otherwise than by such writing? The principle of recovery must be that the company assented to the additional insurance; if it did not, it is not bound. Ordinarily,

the general agent would have the right to make such assent; but when the power of the agent to make the consent is restricted to cases in which by writing indorsed on the policy he evidences the consent, it would seem that in order to bind the company, the condition prescribed must be performed: *Morris v. Orient Ins. Co.*, 106 Ga. 472. Richards, in his treatise on the Law of Insurance, page 25, says that where by the terms of a policy notice is given to the applicant that agents have no authority to waive the conditions of the contract except by written agreement, it is evident that, at any rate, after such notice is received by the insured, neither the ostensible authority nor the actual authority of the commissioned agent is sufficient to enable him to effect a parol waiver of the conditions of the policy. And in 2 Wood on Fire Insurance, 863, citing authorities, the rule is laid down: "That an agent may waive a forfeiture is well established by numerous authorities. But, where a limitation is imposed upon the power of the agent upon the face of the policy, of which the assured, as a prudent man, ought to know, and there is no evidence that the agent has been accustomed to act in excess of such power, with the express or implied assent of the insurer, the insured is not justified in dealing with him in relation to such matters, and his acts as to excess of authority are not binding upon the company." Ostrander on Fire Insurance, 36, citing adjudicated cases, enunciates the same doctrine in this language: "If, however, the insured has notice of the restrictions imposed upon the ³⁹⁷ agent, the company will not be held." Under the general law of agency, the rule is that parol evidence is not admissible for the purpose of enlarging or extending the powers conferred by written instrument, and the nature and extent of the authority must be ascertained from the instrument itself. It must be borne in mind that we are not now dealing with the question as to what notice to the agent is notice to the company, but whether or not, when one party to the contract expressly stipulates that its assent to a change in the contract executed shall not be binding unless by the written agreement of its agent attached to the original contract, a parol agreement not known to or ratified by the principal has the effect to change the terms of the contract as entered into. In the case of *Quinlan v. Providence Washington Ins. Co.*, 133 N. Y. 356, 28 Am. St. Rep. 645, it was held by the court of appeals of New York, that where a policy permits an agent to exercise a specified authority, but prescribes that the company shall not be bound unless

the execution of the power shall be evidenced by a written indorsement on the policy, the condition is of the essence of the authority, and the consent or act of the agent not so indorsed is void: Citing *Walsh v. Hartford etc. Ins. Co.*, 73 N. Y. 10; *Marvin v. Universal Life Ins. Co.*, 85 N. Y. 278, 39 Am. Rep. 657. And in the case of *Baumgartel v. Providence Washington Ins. Co.*, 136 N. Y. 547, the court held that where it was provided in a policy of insurance that the insurance should be void if the insured procured other insurance on the property, and that no officer or agent could waive such condition except by indorsement on the policy, and the insured, having obtained other insurance, informed the agent who had issued the policy, and the latter said he would attend to it but failed to do so, the agent's promise did not constitute a waiver of the condition, nor affect the right of the company to insist on a forfeiture. And in the case of *Carey v. German-American Ins. Co.*, 84 Wis. 80, 36 Am. St. Rep. 907, it was held that where a fire insurance policy provides that no agent of the company shall be held to have waived any of the conditions of the policy unless such waiver shall be indorsed in writing, it is error to admit oral evidence of a waiver of forfeiture by the local agent of the company.

³⁰⁸ In the case of *Simonton etc. v. Liverpool etc. Ins. Co.*, 51 Ga. 76, the point ruled was, that where the insured were removing their goods from one place to another in the city of Atlanta, and they were notified by the agent of the company that the removal would vitiate the policy unless they desired it continued, and when the insured said that they so desired, and the agent of the company orally represented that the company would agree, but no new policy was taken out, and the goods were lost by fire, they could not recover under such parol agreement. And in the case of *Mitchell v. Universal Life Ins. Co.*, 54 Ga. 289, the court held that the offer of parol evidence to alter the contract implies that the contract is not what the parties made, and that the uniform experience is that it is wisest to adhere to what the parties have knowingly written. And, finally, in the case of *Western Assur. Co. v. Williams*, 94 Ga. 128, where the policy stated that the insurance was upon property located and contained as described in the policy, and where it was contended on the part of the defendant that the agent had no authority to consent to the removal of the property unless the consent was indorsed on the policy, and such policy contained a stipulation such as that which we are now

considering, the court held: "This clause puts the insured upon notice that the agent has no authority to waive a condition of the policy, except in writing attached to the policy; and the insured would, therefore, have no right to rely upon any waiver not made in that manner, unless it could be shown that the company did in fact authorize the agent to make the waiver otherwise." It is true in this case that our present chief justice, while discussing the legal effect of a stipulation in a policy similar to that which we are now considering, said that this clause put the insured upon notice that the agent has no authority to waive a condition of the policy, except in writing attached to the policy, and the insured would, therefore, have no right to rely upon any waiver not made in that manner, unless it could be shown that the company did in fact authorize the agent to make the waiver otherwise, and that, "to establish such authority on the part of the agent, the insured would have to show that it was expressly ³⁰⁰ granted by the company in the given instance, or would have to show some previous course of dealing in similar cases by the agent with the company's consent, manifested by ratification or otherwise." The language used by the chief justice in no way controls or qualifies the principle ruled in this case. For, confessedly, it was not shown, nor attempted to be shown, that the company expressly granted to the agent the power to give the assent to the additional insurance otherwise than in writing, nor was any previous course of dealing in similar cases, which was ratified by the company, attempted to be shown. On the contrary, the plaintiff in error rested his case upon the proposition that, where the agent had the power to waive a condition of the policy so as to assent to additional insurance, notwithstanding the fact that a condition of the policy restricted the power of the agent to make such consent in writing, as the agent had the power and did consent, although orally, nevertheless the company was bound.

These authorities seem to be conclusive of the question involved in this case. The rule in *Carrugi v. Atlantic Fire Ins. Co.*, 40 Ga. 135, 2 Am. Rep. 567, and *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660, is to the effect that where the contract of insurance provides that the agent may change the conditions expressed in the policy by writing thereon, such agent having the power, the company is bound when the agent having notice agrees to the changed condition. In the case at bar, however, when the power of the agent to change the condition is limited so that no change by the agent shall be effected unless the same is done

by a writing on the policy, the power of the agent as to the manner of such change being restricted, the company cannot be held to the terms of such changed conditions, unless the change has been made in accordance with the terms prescribed in its original contract. The law abhors a forfeiture; and when a contract of insurance has been entered into, while both parties should be held to an observance of its terms, the contract will be interpreted most strongly against the company. While this is so, it is nevertheless true that a contract of insurance is governed by the same rules of interpretation as apply to other contracts; and where parties incorporate certain terms or stipulations in their contracts, it is not the province of the court to ~~also~~ extend or enlarge them, but, in construing them, to give expression to the true intent of the parties, and in so doing the language used is the best criterion of intention. We therefore rule that the evidence offered was inadmissible, and that the court did not err in granting a nonsuit.

Judgment affirmed.

All the justices concurring.

INSURANCE, ADDITIONAL—WAIVER OF CONDITION AGAINST.—A local insurance agent has no authority, after issuing a policy, to waive a clause therein providing that additional insurance shall avoid the policy unless written consent thereto should be indorsed thereon. Additional insurance taken upon the authority of such an attempted waiver avoids the policy: *Taylor v. State Ins. Co.*, 98 Iowa, 521, 69 Am. St. Rep. 210, and note. Compare *Morrison v. Insurance Co.*, 69 Tex. 353, 5 Am. St. Rep. 63; *Grubbs v. North Carolina etc. Ins. Co.*, 108 N. C. 472, 23 Am. St. Rep. 62.

TUCK v. NATIONAL BANK OF ATHENS.

[188 GEORGIA, 446.]

NEGOTIABLE INSTRUMENTS—PAYMENT—NOTICE OF NONPAYMENT.—The maker of a negotiable instrument is not by law entitled to notice of maturity and nonpayment. The fact that a bank pledgee of a note falls, by agreement with the payee, to notify the maker that the note has been discounted, does not constitute a fraud upon the maker or warrant him in paying the note to the original payee without requiring him to produce and surrender it.

APPEAL—DIRECTING VERDICT.—IT IS REVERSIBLE ERROR to direct a verdict upon conflicting evidence which would have warranted a finding contrary to that which was directed.

H. C. Tuck, Erwin & Erwin, and Lumpkin & Burnett, for the plaintiff in error.

J. J. Strickland and W. S. Basinger, for the defendant in error.

⁴⁴⁷ LITTLE, J. This case was here and decided at the March term, 1897: See *National Bank v. Tuck*, 102 Ga. 556. It was simply ruled then that the principles announced in the decision in the case of *Bank of University v. Tuck*, 101 Ga. 104, controlled the case, and the judgment rendered in favor of Tuck was reversed and a new trial ordered. At the next trial the court, at the conclusion of the evidence, directed a verdict for the bank, and Tuck made a motion for a new trial, which was overruled. There are but two grounds of the motion which need to be considered by us in determining the case. The defendant amended his pleas, which amendments, in substance, allege that there was an agreement between the bank and the Reaves Warehouse Company that no notice should be given to Tuck, the maker of the note, that the same had been discounted and was held by the bank, and it is alleged that the fact that the note was discounted and so held was purposely and intentionally concealed from the maker, and it is insisted by the plea that this conduct was a legal fraud on the rights of the defendant, because it enabled the Reaves Warehouse Company to collect the note, which they could not have done if the notice had been given. The amendments to the plea were on motion stricken by the court, and error is assigned in the first ground to the striking of the amendment.

1. The maker of a negotiable instrument, whether payable at a bank or not, is not by law entitled to notice of maturity and nonpayment, nor does the fact that the pledgee of such a note fails, by agreement with the payee or otherwise, to notify the maker of the fact that the note has been pledged and who holds the same, of itself, constitute any fraud against the maker. Not being entitled to such notice, he could not claim any benefit for the want of it. Circumstances might arise which would form an exception to this rule, but they do not exist in this case, and as the amendments set up, as a defense, facts which could not operate as such if proved, the court committed no error in disallowing the amendments.

2. In the case of *Bank of University v. Tuck*, 101 Ga. 104, which ⁴⁴⁸ was a case very similar to the one now under consideration and the decision of which this court ruled con-

trolled this case, the court held that the liability of the defendant depended upon whether the Reaves Warehouse Company was the agent of the bank, either express or implied, to collect the note. There was much evidence introduced in the present case for the purpose of showing that the Reaves Warehouse Company had expressly been made the agent of the bank to collect the note sued on, as well as to show that no such agency existed. As far as we could we have carefully compared the evidence in the record of the present case with that in the record of the case reported in *National Bank v. Tuck*, 102 Ga. 556. This examination discloses that the evidence tending to show express agency on the part of the warehouse company to collect the note for the bank has been materially strengthened by the evidence of White for the plaintiff and O'Farrell for the defendant, as their evidence appears in the present record. Indeed, after a careful consideration of the evidence of these witnesses, when taken in connection with the other evidence in the case, we are of the opinion that it puts in issue the fact of the existence of such agency. This being our conclusion, it follows, as a matter of course, that the court erred in directing a verdict for the plaintiff. Such a direction is only authorized when there is no conflict in the evidence, but where such evidence demands a particular verdict: Civ. Code, sec. 5331. We have made no attempt to set out the differences which appear to us to exist in the record in the former case and in this as to the testimony of the witnesses, nor do we intimate that if the case had been submitted to the jury under proper instructions to find a verdict under the evidence before them, and they had returned the verdict which they did under the direction of the court, such verdict would have been contrary to the evidence. What we do mean to say is, that, as it appears in the record, the evidence upon the fact of agency is conflicting, and that there is enough to have warranted a finding contrary to that which was directed; and we reverse the judgment because, under these circumstances, the case should have been submitted to the jury for a verdict.

Judgment reversed.

All the justices concurring, except Cobb, J., who was disqualified.

NEGOTIABLE INSTRUMENTS—PRESENTATION.—The maker of a note payable at a particular time and place is liable thereon, though it is not presented at the time and place named: Greeley

v. Whitehead, 35 Fla. 523, 48 Am. St. Rep. 258. Demand or notice is not necessary to bind an indorser if there is no principal party liable on the note or bill: Note to McLanahan v. Brandon, 14 Am. Dec. 189, 190.

TRIAL—DIRECTING VERDICT.—If the evidence clearly establishes the right of the plaintiff to recover, and no defense is proved, it is proper for the court to direct a verdict for the plaintiff, but not otherwise: Moore v. Baker, 4 Ind. App. 115, 51 Am. St. Rep. 203.

HOUSER v. CHRISTIAN.

[108 GEORGIA, 469.]

ADVERSE POSSESSION — MINERAL INTERESTS.—The grantees in a deed which reserved the mineral interests in the land conveyed to them cannot, as against the grantors or their privies, set up title by prescription to such mineral interests, unless they have in some manner given notice to the grantors or their privies that they intended to hold or were holding adversely to them.

R. P. Lattner and O. J. Lilly, for the plaintiffs.

Dean & Hobbs, for the defendants.

470 SIMMONS, C. J. This was a suit for the recovery of the mineral interests in certain land. The defendants set up a prescriptive title. The evidence showed that the defendants went into possession of the land under a conveyance from one of the plaintiffs and those under whom the other plaintiffs claim the mineral interests in the land. This conveyance of the land to the defendants expressly reserved the mineral interests therein. The jury returned a verdict for the plaintiffs. The court granted a new trial, and the plaintiff excepted.

We think that the grantees in a deed which reserved the mineral interests in the land conveyed to them cannot, as against the grantors or their privies, set up title by prescription to such mineral interests, unless they have in some manner given notice to the grantors or their privies that they intended to hold or were holding adversely to them. There was no such notice shown in this case, actual or otherwise. There was no evidence that any mine had ever been worked on the land. Prescription can ripen only after notice of an adverse claim. Until after notice of such a claim, the possession, as to the mineral interests, is merely permissive, and the mere holding of the land for any number of years will not ripen into a prescriptive title where the possession is only permissive. The record does

not disclose that any notice whatever was ever given by the defendants to the plaintiffs of any adverse holding of the mineral interests in this land. Having received the deed with a reservation of the mineral interests and having given no notice of any adverse holding, the defendants are estopped to set up any prescriptive title to the mineral rights. For these reasons we think that the verdict for the plaintiffs was demanded, and that the court below erred in granting a new trial. There are other questions raised by the bill of exceptions and the motion for new trial, but the view we take of the case renders it unnecessary to discuss them.

Judgment reversed.

All the justices concurring.

ADVERSE POSSESSION—MINERALS.—If the title to the surface of land has been severed from the title to coal and mineral underneath in place, the possession of the surface for the statutory period of limitation does not convey the title to such coal and mineral: *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 72 Am. St. Rep. 216, and note.

TO CONSTITUTE ADVERSE POSSESSION the true owner must know that the adverse holder claims in his own right, or the possession must be so open and notorious as to raise the presumption of notice: *Normant v. Eureka Co.*, 98 Ala. 181, 39 Am. St. Rep. 45. See, further, as to what constitutes adverse possession, the notes to *Willamette Real Estate Co. v. Hendrix*, 52 Am. St. Rep. 806; *De Friese v. Quint*, 28 Am. St. Rep. 158-162.

ROSE v. WEINBERGER.

[106 GEORGIA, 532.]

SALE OF FRUIT IN TRANSIT—BUYER'S RISK.—Where fruit already in transit is bought from one who the buyer knows is not the shipper, and the purchase is at the "buyer's risk," the term "buyer's risk" places upon the buyer all risk of damage caused by defective cars, improper packing, and decay of fruit.

SALE OF FRUIT TO BE SHIPPED—BUYER'S RISK.—Where the owners and shippers of fruit sell it at the "buyer's risk," such term places upon the purchaser the risks of transportation alone, after the title has passed to him, but all risks incident to defective cars and improper packing at the point of shipment are assumed by the shipper.

Rosser & Carter, for the plaintiffs in error.

Maddox & Terrell, for the defendants in error.

⁶³³ FISH, J. Weinberger & Co., residents of New Orleans, sued Rose & McDonald upon a contract for the purchase of a carload of fruit. The contract was contained in certain letters and telegrams which passed between the parties, and was, in brief, that the plaintiffs sold the defendants a carload of fruit which was in transit from certain shippers in California to the plaintiffs; the terms of the sale being "f. o. b. California, buyer's risk, California weights. Rate \$1.50 hundred, refrigerator charges, \$185." The petition alleged that the amount due by defendants, including refrigerator charges, was eight hundred and ninety-one dollars and sixty-five cents. In defense to the action the defendants pleaded that by the terms "f. o. b. California, buyer's risk," it is meant and understood, and was meant and understood between the parties to the contract, that plaintiffs should securely and properly pack the fruit in a proper and suitable car; and that if, under the terms of the contract, any damage should result from such failure to properly pack or from the defective condition of the car, the plaintiffs should rightfully be responsible therefor. It is alleged that the fruit was not properly packed and that the car was defective, and that as a consequence the fruit was worth but one-third of the price contracted to be paid ⁶³⁴ for it when it reached Atlanta, and that these defects were known or should have been known to the plaintiffs when they made the sale. The defendants filed another plea, in which they alleged that the contract sued on was made by the plaintiffs as agents for Pinkham & McKevitt, their consignors from California; that the shipping of the fruit from California was at the risk of Pinkham & McKevitt and plaintiffs; and that if the goods were shipped at the risk of these defendants, they assumed such risks only after the contract between the plaintiffs and defendants was entered into, and then the risk assumed was only that of transportation; that by the custom of the California fruit trade it was the duty of the sellers and shippers to furnish a proper car in which to ship fruit and to properly pack the fruit, and that it was the duty of plaintiffs not only to furnish a proper car but to properly pack the fruit, which they failed to do. The plaintiffs made a motion to strike the pleas of the defendants, and after hearing such motion the judge passed an order reciting that, it being admitted in the pleas that the defendants entered into the contract sued on, and they admitting in open court that the words "f. o. b." as used in the contract meant "free on board," the pleas were stricken as not setting forth any sufficient matter of defense.

To the granting of this order the defendants excepted. The court then directed a verdict in favor of the plaintiffs for the full amount sued for, with interest; and to this also the defendants excepted. It will be observed that the first of the pleas above referred to treats the plaintiffs as the owners of the car of fruit at the time the contract was entered into, and alleges facts which it is claimed would be a bar to the action by the plaintiffs as owners. On the other hand, the second plea sets up a defense against the plaintiffs as agents of the real owners, who were alleged to reside in California.

1. We will deal with these pleas in their order. The plea which sought to set up a defense against the plaintiffs as owners was properly stricken. The defendants' agents in Atlanta wrote to plaintiffs, asking if they had any fruit "in transit." Plaintiffs replied by wire that they had a car, and made an offer to sell it. Defendants' agents wired in reply an acceptance of ^{the} the offer if certain changes were made, and the plaintiffs replied agreeing to the contract so changed. Upon this the contract of sale became complete, and the liability of each of the parties thereto is to be determined from the contract so made. Viewed in the light of the fact that the car of fruit was bought in transit and that the plaintiffs knew this fact, what was meant by the parties when they used the terms "f. o. b. California, buyer's risk"? It was admitted that f. o. b. meant "free on board," and hence under this part of the contract the defendants were to be responsible for the cost of shipment from California to Atlanta: Bouvier's Law Dictionary, tit. "f. o. b." When the contract of sale became complete, the defendants assumed all risk of loss or damage occurring thereafter: 1 Benjamin on Sales, sec. 319, and cases cited. Treating the plaintiffs as the owners of the property, the defendants by their contract agreed to accept the car in whatever condition it might be when the contract was entered into. The car was in transit, having been shipped from California to the plaintiffs. They had no opportunity to inspect it; they knew nothing about its condition; and we think that by their proposal to the defendants they meant to say: We have a car of fruit in transit from California. We have not seen it, nor do we know anything about its condition. We will sell you this car at a specified price, but it must be understood that we do not warrant the condition of the fruit, and expect you to assume all risks or loss or damage that may arise. We sell you this car, which we agree is fruit of a certain kind, and, if the car is found to be loaded with this particular kind of

fruit, then you must accept it in whatever condition it may be when it reaches you. Such seems to us to be the meaning of the contract. If by buyer's risk the plaintiffs meant that the defendants would assume only such risk of loss or damage as might arise after the contract was entered into, the words might as well have been left out of the contract; for, as we have seen, the law cast upon the defendants all such risks thereafter arising. If these words have any significance at all, their plain common-sense meaning is that the defendants must assume all risks—defective car, improper packing, decay of fruit, etc., and the only ⁵³⁸ defense left them is that they did not in fact get what they bought. This was the only thing that the plaintiffs warranted; everything else was at the risk of the purchasers. There is no allegation that the car contained other than the kind of fruit contracted for; and the defendants by their contract having bought fruit in a decayed condition, they have no just cause of complaint.

2. Ought the same meaning to be attached to "buyer's risk," if the contract was made with the owners of the fruit, who packed the same for shipment? One of the pleas sets up that the plaintiffs were not the owners but were mere agents of the owners, who were also the shippers in California. While an agent may in his own name maintain a suit on a contract so made for the benefit of his principal (Civ. Code, sec. 3037, par. 3), still in such a suit any defense will be allowed to the defendant which he could lawfully set up against the principal if the suit had been brought in his name. A holding that, relatively to the shippers and owners, buyer's risk meant that the purchaser was to assume risks of defective car and improper packing, in a case like the present one, would allow the owner to perpetrate a fraud on the buyer. Under the allegations in the plea, the owner knew just what condition the car was in—knew that it was not suited for carrying fruit; knew that the fruit was improperly packed; and knew that it would reach its destination in a damaged condition. While the purchaser might be willing to assume any risks of damage that might arise to the fruit when properly shipped, it is hardly to be presumed that he would enter into a contract to buy a car of fruit which was absolutely certain to be decayed when it reached him. That by the use of the term "buyer's risk" the parties intended that the purchaser must take the risks of transportation, but that all risks incident to improper packing in the car at the initial point of shipment were to be assumed

by the shipper, seems clear when we take into consideration the long distance the fruit was to come, its perishable nature, and the absolute necessity that it should be properly packed. The plea distinctly alleges that it was the custom of the California fruit trade that the shipper should see that the fruit was ⁵³⁷ properly packed in a suitable car, and that "buyer's risk" meant that the defendants were to take the risk only after the title had passed to them; and construing the plea as a whole, we think it set up a good defense as against the owners of the property. If it should be determined at the trial that the plaintiffs were the owners at the time the contract was entered into, the defendants under their contract would have no defense to the action. If, on the other hand, it should be determined that Pinkham & McKeivitt were the owners, then the defendants would be let into the defenses sought to be set up against the plaintiffs as agents of these owners.

Judgment reversed.

All the justices concurring.

Buyer's Risk.*

It is a general rule in the law of sale that risk follows the title. This rule is universally recognized and needs no citation of authorities to support it. If the vendor of goods retains the title to them until actual delivery to the vendee, then any loss or damage which they may suffer during the course of transportation must be borne by the vendor. On the other hand, if the title to the goods vests in the vendee at the moment of the sale or upon delivery to the carrier, then the risk of loss or damage to the goods during transportation is upon the vendee. This rule is clear and well settled. It is, however, difficult of application at times, and it is frequently a question of fine-haired distinction whether or not the title to the goods has passed, and consequently at whose risk the goods are during the course of transportation. Probably by reason of this uncertainty, and for the purpose of fixing the risk upon the buyer irrespective of the question whether the title is in him or not, there has come into quite general use the term "buyer's risk" which is incorporated into contracts for the sale of goods which are to be transported. The term has, however, been the subject of scant judicial interpretation. *Castle v. Playford*, L. R. 7 Ex. 98, is the leading case on the question, the contract in this case containing the clause, "the purchaser takes upon himself the risks and dangers of the seas." In the case as first reported in L. R. 5 Ex. 165, it was held that this clause did not have the effect of imposing on the purchasers the entire risk for loss at

* REFERENCE TO MONOGRAPHIC NOTES.

Loss during transportation falls upon whom: 26 Am. St. Rep. 451-453.

sea, and render them liable whether the goods were delivered or not, but that its sole effect was to relieve the vendors from any liability to an action for nondelivery. This decision was reversed by a unanimous court in *L. R. 7 Ex. 98*, Cockburn, C. J., and Blackburn, J., delivering the opinions. The court was disposed to think that this clause passed the property in the goods and the title was, therefore, in the vendee, and, the title being in the vendee, the goods were clearly at his risk according to the universal rule to which we have already called attention. Blackburn, J., in the course of his opinion, clearly indicates the ground upon which the opinion rested. "My impression is," he said, "if it were necessary to decide it now, that the effect of this contract is that the property passed; but I think it is unnecessary to decide the matter. The parties in this case have agreed, whether the property passed or not, that the purchaser should, from the time he received the bills of lading, take upon himself all risks and dangers of the seas; and, according to Mr. Littler's construction, I do not see what risk he took upon himself at all, unless it was this—that he said: 'If the property perishes by the dangers of the seas, I shall take the risk of having lost the property, whether it be mine or not.'" This, we believe, is the correct construction of contracts of this character. It may be that the vendor wishes to retain title to the property in himself, and yet for his further protection a clause is incorporated in the agreement that during transportation the goods are at the risk of the vendee. And if the effect of such a clause should be to transfer the property, his other expressed intention, as to retention of the title would be nugatory. The case of *Martineau v. Kitching*, *L. R. 7 Q. B. 436*, points out that this clause is used in contracts where the property has not yet passed, because if title had already passed to the buyer the property would be at his risk in any event, under the rule that risk follows title. In this case the goods were at the seller's risk instead of the buyer's, but the principle was precisely the same. Here sugar was in the warehouse of a broker, under a contract which read "goods at seller's risk for two months." The sugar had been sold but not hauled away when it was destroyed by a fire. This action was brought to recover from the buyer the price of the sugar, the seller contending that the property was in the buyer, and, since the risk followed the title, any loss which occurred must be borne by him. But the court, in holding that the seller must bear the loss notwithstanding the title to the property may have been in the buyer, said: "What would be the necessity, what would be the object or purpose of such a stipulation that the goods should be at their [the sellers'] risk during the two months if the property still remained in them? Of course, it would then be at their risk." As was said by Blackburn, J., in the same case: "Where the parties have stipulated that the risk shall be on one side, it matters not whether the property had passed or not." This rule is recognized by *White v. Solomon*, 164 Mass. 516.

The principal case extends the meaning of the term "buyer's risk" when used in a contract, since it holds not only that the risk is on the buyer from the time the contract is entered into irrespective of the question whether the title is in him or not, but it holds that in a sale made while goods are in transit by one who was not the shipper, the term "buyer's risk" casts the burden of loss on the buyer not merely from the time of the contract, but from the time when the goods were packed and loaded into the cars, and loss by reason of imperfect and negligent packing is a risk, which the buyer has assumed. This seems to be correct, as is also the other rule established by the case that a buyer does not assume as a risk imperfect packing and defective cars known to his seller and shipper. An added reason why this would be true is that to hold that the term "buyer's risk" casts the burden of loss on the buyer for the seller's and shipper's imperfect packing would be to stipulate against injury which is the result of one's own negligence which cannot be done by the use of so vague a term. Even though the title were in the buyer and the consequent risk attaching thereto, if the seller is guilty of negligence in handling the goods he would clearly be liable therefor the same as any other bailee. So far as the defective car is concerned, it seems that in the principal case its defective condition was known to the seller. If, however, the seller had nothing whatever to do with the car in which the goods were shipped, and did not and could not know of its defective condition, there would seem to be no ground for holding the seller liable for its defective condition and the consequent injury to the goods. "Buyer's risk" in such a case would only include liability for all loss subsequent to the delivery of the goods to the carrier by the seller. The question seems never to have been passed upon judicially.

McCROSKEY v. HAMILTON.

[108 GEORGIA, 640.]

AGENCY—POWER TO APPOINT SERVANT OR SUB-AGENT.—An agent's authority embraces all the means usual and necessary for its proper execution; hence a general agent may appoint a servant for the purpose of doing some particular act, not involving the exercise of discretion, provided it is within the scope of the agency, though he may not appoint a subagent to exercise discretionary powers.

LANDLORD AND TENANT—NOTICE OF OPTION TO TERMINATE LEASE.—Under a lease which provided that "should any payment fail to be made at or within thirty days after its maturity, the lease may be terminated at the option of the party of the first part," a demand for the possession of the premises, after a demand for payment of rent due for more than a month, constitutes a sufficient notice that the lessor was exercising his option to terminate the lease, although the demand for back rent is coupled with a demand for rent for the succeeding month.

Reed & Hartsfield, for the plaintiff.

D. S. Craig and Hamilton Douglas, for the defendant.

⁶⁴⁰ LUMPKIN, P. J. On the 15th of January, 1896, Mrs. McCroskey made a lease to J. S. and K. S. Hamilton of certain realty. It, among other things, stipulated that the tenants were to pay each month a specified sum as rent, and that "should any payment fail to be made at or within thirty days after its maturity, the lease may be terminated at the option of the party of the first part." The Hamiltons made a default in paying the stipulated rent for a particular month, and as to it were in default for more than thirty days. Thereupon an affidavit ⁶⁴¹ was made by one Rustin, who in so doing acted as agent for Mrs. McCroskey, for the purpose of obtaining a warrant to dispossess the tenants. In this affidavit it was alleged that "the said tenants failed to pay the rent now due" on the leased premises, and that they were holding the same over and beyond their term. Accordingly, a warrant was issued and placed in the hands of the sheriff, to whom the Hamiltons tendered a counter-affidavit, simply alleging that the term for which they had rented the premises had not expired, and that they were not holding over and beyond the same. The papers were returned to the superior court, and the case duly came on for trial. The lease contract was introduced in evidence, and the following facts were proved by the plaintiff: One Girardeau was her renting agent. As such he leased the property in controversy to the defendants. He collected the rents until default in paying them was made. The plaintiff, shortly after the contract was closed with the defendants, instructed him not to allow the rent to run beyond thirty days without collecting it or getting possession of the premises. She told him, with reference to the thirty days' clause in the lease, not to let it run longer, but in case of default to immediately dispossess the tenants. Girardeau, in pursuance of his instructions from Mrs. McCroskey, sent his "bookkeeper, office-man, and collector," Rustin, to make a demand for the rent. At that time the rent for two months was due, and as to one month had been due for more than thirty days. Rustin demanded the rent for both these months. There was no payment, and he thereupon demanded possession of the premises, which was refused, and the dispossessionary warrant was sued out.

At the conclusion of the evidence the defendants moved for a nonsuit. In support of their motion it was insisted: 1. That

as the first ground for removing the tenants set forth in the plaintiff's affidavit had not been met or denied by the counter-affidavit, the sole issue for trial in the superior court was whether or not the plaintiff was entitled to dispossess the defendants under the second ground contained in her affidavit, viz., that the tenants were holding over and beyond their term; and 2. That the plaintiff had failed to establish the truth of ~~case~~ this ground. On the other hand, counsel for Mrs. McCroskey contended that the case should be submitted to the jury, in order that she might recover the double rent to which they insisted she was entitled under the statute. The court, being of the opinion that the reasons urged by counsel for the defendants for the granting of a nonsuit were both good, sustained their motion. It will thus be seen that no effect whatever was given to the plaintiff's contention that the tenants should be dispossessed for nonpayment of rent; and, under the ruling made by the trial court, her allegation as to this matter, which was fully established by evidence, counted for nothing. The plaintiff might have moved to strike the counter-affidavit as insufficient in law, but she did not choose to pursue this course; nor did the judge of his own motion decline to try the case on the ground that the counter-affidavit was not sufficient to have arrested the progress of the plaintiff's warrant. Both court and counsel dealt with the case as one to be disposed of by a jury, and accordingly the plaintiff submitted evidence to establish both grounds set forth in the affidavit to dispossess. She proved the first; but as the truth of it was not denied by the defendants, his honor thought she was not entitled to recover double rent unless the evidence warranted a finding in her favor upon the question at issue actually made by the pleadings. Assuming that this was the correct view of the matter, the case turns upon the inquiry, Did the plaintiff prove that the defendants were holding the premises over and beyond their term? We think she did. The reasons urged to the contrary may be briefly stated as follows: 1. Rustin was not Mrs. McCroskey's agent, but a mere subagent of Girardeau, and, therefore, without authority to declare in her behalf a forfeiture of the lease; and this being so, forfeiture could not result from a subsequent ratification by her of his acts; 2. He was not instructed by Girardeau, his principal, to declare a forfeiture; and, even if he was, did not in fact undertake to do so, his demand for two months' rent being inconsistent with such a purpose, but, on the contrary, entirely consistent with a design to allow

the tenants to remain in possession. The conclusions of fact embraced in the foregoing summary are not, in our opinion, warranted by ⁶⁴³ the evidence in this case. It may be true, as matter of law, that if Rustin's acts at the time he demanded the rents and the possession of the premises were wholly unauthorized, a subsequent ratification of them by Mrs. McCroskey would not establish by relation a notice to the Hamiltons to give up the premises: 1 Am. & Eng. Ency. of Law, 2d ed., 1194. "The reason is that the tenant must act upon the notice at the time it is given, and it must, therefore, at that time, be such a notice as he can act upon with security; and if authority by relation were sufficient, the tenant would be subjected to the injustice of being left in doubt as to his action until the ratification or disavowal of the principal": *Brahn v. Jersey City Forge Co.*, 38 N. J. L. 74.

We agree with counsel for the defendants in error that Rustin was not acting in the capacity of agent for Mrs. McCroskey, and, consequently, we do not think that the doctrine of ratification is applicable. As to this branch of the case, our views are as follows: Girardeau was unquestionably Mrs. McCroskey's agent, and as such was not only authorized but expressly directed to declare the lease forfeited upon noncompliance with its terms. He certainly could, in his own proper person, have exercised the authority conferred upon him by his principal. We are quite clear he could also do so by using his servant, and that as to this matter Rustin was nothing more. He was not, in any proper sense, a subagent of Girardeau, but a mere instrument. On this occasion he simply acted as the messenger of his employer. The relation between Girardeau and Rustin was plainly that of master and servant. Girardeau, as agent for Mrs. McCroskey and in attending to her business, surely had the right to avail himself of the services of his own servant as a means for accomplishing the end in view. "It is a general principle that an agent's authority is construed to embrace all the means usual and necessary for its proper execution": 1 Am. & Eng. Ency. of Law, 2d ed., 979, 980. "A deputy possessing general powers may, in many cases, constitute another person his servant or bailiff, for the purpose of doing some particular act; provided, of course, that such act be within the scope of his own legitimate agency": *Broom's Legal Maxims*, 7th ed., 841. And see the instances, pertinent ⁶⁴⁴ here, which this great author gives of the application of this rule. Girardeau, representing Mrs. McCroskey, could have sent to the Hamiltons

by Rustin a written demand for the rent which had been due for more than thirty days, and could have stated therein that, in case of nonpayment, they might understand that the lease was at an end. Instead of doing this, he sent Rustin to the Hamiltons with instructions what to do; and we shall presently undertake to show that this was, in substance, the same thing as sending a written demand and notice of the kind just indicated. The distinction between "servant" and "agent" is clearly pointed out in *Mechem on Agency*, section 2, and *Wharton on Agency*, section 19. According to these authorities, an agent has more or less discretion, while a servant acts under the master's control and direction. Clearly, Rustin was not invested with any discretion. He was simply to do as he was bid.

The next question is: Did Girardeau direct Rustin, in case the demand for the rent was not complied with, to declare a forfeiture of the lease? It does not appear that Girardeau did this in so many words, but we think there was enough proof on this subject to warrant a jury in finding that this was what Girardeau told Rustin to do, and that the latter so understood his mission to the Hamiltons. The evidence shows that Girardeau, in pursuance of his instructions from Mrs. McCroskey, sent Rustin to make a demand for the rent. Those instructions were to immediately terminate the lease and take possession of the premises if rent which had been due for more than thirty days was not paid. Rustin seemed to understand thoroughly the business on which he was sent, for he demanded payment of the rent, and, payment having been refused, he then demanded possession of the rented property. Putting these things all together, there is not much room for doubting that Rustin did exactly what he was sent to do.

There is yet another question to be dealt with. It is, Were the demands made by Rustin the equivalent of a notice to the Hamiltons that Mrs. McCroskey was exercising her option to terminate the lease and bring the tenancy thereunder to an end? In an opinion filed by his honor of the trial bench, after stating that Rustin demanded not only rent more than thirty days past due, but also rent not this long in default, he says: "This was rather in the nature of insisting on a continuation of the lease than its termination." We cannot concur in this view. No demand whatever for payment of rent was essential to declaring a forfeiture of the lease. All that was necessary to this end was a mere notice that Mrs. McCroskey had elected to avail herself of her option to terminate it. What,

then, was the effect of a demand for all the rent due under the terms of the contract? Plainly, that if payment thereof in full should be immediately made, she was willing to waive her right to declare a forfeiture. Demanding the two months' rent was entirely consistent with the idea of making such a waiver, and a consequent continuance of the tenancy, if her demand was at once complied with. This demand was, however, refused; and if matters had stopped there, the Hamiltons might have been justified in inferring that they would be still further indulged. But Rustin did not stop with demanding the rent. When payment thereof was refused, he at once made an unequivocal demand for the possession of the premises. What, under the circumstances, did this demand mean? It could mean nothing but that the lease was to be considered by the Hamiltons as terminated. They must, therefore, have fully understood, when on their refusal to pay anything Rustin demanded possession of them, that the demand was based upon and made under the terms of their contract of lease. We therefore think they were fairly notified of Mrs. McCroskey's determination to exercise her option, therein contained, to declare a forfeiture; for they unquestionably knew they had failed to pay rent as stipulated, that they had been in default for more than thirty days as to one month's rent, and accordingly that she was entitled under the contract to demand immediate possession. The only right which they could assert was under and by virtue of their lease. The mere fact that Rustin asked for another month's rent should not be treated as evidencing an intention not to declare a forfeiture. It was proper to ask for it, if the Hamiltons were to remain on the premises. It was due and should have been paid. Demanding payment thereof "46" was not at all inconsistent with the idea that, if payment was refused, Mrs. McCroskey would immediately exercise her right to bring the tenancy to an end, as she undoubtedly had a right to do because the rent for the previous month had not been paid and default in the payment thereof had continued for a period of more than thirty days. Nor, simply because a demand for all the rent then due was made, can it be said that Mrs. McCroskey was estopped from claiming a forfeiture. She simply made an offer to waive her right to exercise her option to terminate the tenancy, provided the Hamiltons, by acceding to the demand made upon them for rent, displayed a willingness to thereafter live up to the terms of their lease. As they, by their refusal to pay all the rent payment of which was de-

manded as a condition precedent to such waiver, declined to accept the offer thus made them, they are not in position to contest the right of Mrs. McCroskey to insist that under the terms of the contract she was entitled to claim a forfeiture. In this connection, see *Sullivan v. Connecticut Indemnity Assn.*, 101 Ga. 809, wherein the principle just announced was applied under a similar state of facts, and it was said: "To hold otherwise, it seems to us, would be going contrary to the plainest principles of right and justice. At most, it could only be fairly said that the association had offered to waive the conditions expressed in the policy, and that the insured had declined to accept the offer."

Judgment reversed.

All the justices concurring.

AGENCY—SUBAGENT.—Ordinarily, an agent has no power to appoint a subagent, yet he may do so when the act to be done is purely ministerial: See monographic note to *Davis v. King*, 50 Am. St. Rep. 111, 112.

LEASE; TERMINATION OF.—If a forfeiture clause in a lease makes it voidable at the option of the lessor, it is not necessary in all cases that he make a formal demand for rent, or a re-entry on the premises, though he must signify to the lessee in some decisive manner his election to terminate the lease, else he will be deemed to have waived his right to do so: See extended note to *Guffy v. Hukill*, 28 Am. St. Rep. 912.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

ELDRED v. MENK.

[188 ILLINOIS, 28.]

TRUSTS—ACTIVE, WHAT ARE.—If a trustee under a will is authorized to rent lands, invest personalty, pay taxes, repair buildings, and keep them insured, and apply the balance of the proceeds to the care, maintenance, and education of the beneficiaries under the will, the duties imposed upon the trustee are active, and authorize a court of chancery to direct and control the manner of their execution.

WILLS—CONSTRUCTION—LEGACY, WHEN VESTS.—A gift by will to a person, if or when he shall attain a certain age, does not vest until that age is attained.

WILLS.—THE INTENTION OF A TESTATOR IS TO BE ARRIVED AT, not by considering portions of the will, but by an examination of the entire will, or the system of bequest, giving due consideration to each and every part thereof.

WILLS—CONSTRUCTION.—BEQUESTS IN A WILL, VALID IN THEMSELVES, MUST BE REJECTED with the invalid ones, if the retention of them would defeat the testator's wishes as evidenced by the general scheme adopted, or if manifest injustice would result to the beneficiaries.

WILLS—LEGACIES, WHEN VEST—PERPETUITIES.—Grandchildren do not take a vested interest under a will directing the payment of personalty and the conveyance of real estate to them upon their attaining the age of twenty-five years, provided that if either grandchild shall die before attaining such age, his share shall be divided among his children, if any, upon their attaining the age of twenty-five years. Such will creates a perpetuity, and is void.

WILLS—PERPETUITIES—DEPENDENT CLAUSES.—If a will provides for the disposition of an estate upon contingencies which may not happen within the life or lives of persons in being and twenty-one years thereafter, it is void as creating a perpetuity, and all provisions of the will so connected with such void provision as to constitute an entire scheme are illegal and must fall with it.

H. T. Rainey, for the appellants.

F. A. Whiteside, for the appellee.

¶ PHILLIPS, J. We shall consider the fourth and seventh assignments of error first. Appellants contend that the circuit court had no power to grant the relief asked in the bill even if the contentions in the bill were well founded, and insist that the controversy involves only legal titles, and hence only legal remedies can be invoked; that by the ³⁵ will the trustee is clothed with only naked power to execute deeds under certain contingencies, and that if he failed to execute them the law would unite the use and the trust, and that as the bill seeks no other relief than that the will be construed the bill should have been dismissed. The recent cases of *Harrison v. Owaley*, 172 Ill. 629, and *Minkler v. Simons*, 172 Ill. 323, are cited as conclusive of this contention. We do not concur in this view. Appellants seem to overlook the thirteenth clause of the will, which directs that the executor (trustee) shall keep the lands rented and the personal property lent at the highest legal rate of interest and well secured upon farm mortgages; that he shall pay legal taxes and assessments, repair buildings, etc., and rebuild when for the best interest of the estate, and keep the buildings insured, and that he apply the balance of the proceeds equally in the "necessary care, maintenance, and education of those entitled to the actual benefit of the respective trusts under the terms and provisions of the will." The duties imposed upon the trustee are more than passive. They are active duties, vesting and holding the title in him pending the period mentioned, and constitute him more than a mere naked trustee, and hence would authorize a court of chancery to direct and control the mode and manner of execution: *Steib v. Whitehead*, 111 Ill. 247; *Minkler v. Simons*, 172 Ill. 323; *Knox v. Jones*, 47 N. Y. 389.

On an examination of the will above, the first question for consideration is, What is the nature of the estate given to the grandchildren? Appellants contend that under the provisions of the will they take a vested interest, with the enjoyment, only, postponed.

The tendency of courts is to consider limitations as vested: *Gray on Perpetuities*, sec. 673, p. 402. "The event upon which a contingent remainder is limited may happen and the contingent become a vested remainder, but not to be enjoyed in possession until some fixed time or until the dropping out of an

existing estate for life. ³⁶ There is a difference between 'vesting' and 'the enjoyment of possession,' and it is sufficient if the contingent becomes a vested remainder within the time limited by the rule against perpetuities, although the enjoyment may be postponed beyond such time": *Madison v. Larmon*, 170 Ill. 65, 62 Am. St. Rep. 356.

In *Knight v. Pottgiesser*, 176 Ill. 368, we held that an immediate right of present enjoyment is not essential to a vested remainder that it is sufficient if there is a present vested right to future enjoyment; that the vesting of a gift in remainder will not be postponed, but will vest at once, the right of enjoyment, only, being deferred; that the principle which applies to and controls the vesting of bequests of personal property is, in general, equally applicable to devises of real estate.

"If a remainder is vested—that is, if it is ready to take effect whenever and however the particular estate determines—it is immaterial that the particular estate is determinable by a contingency which may fall beyond a life or lives in being. For instance, if an estate is given to the unborn child of A until he dies or changes his name, and to B and his heirs, B has a vested remainder, for he will take the estate whether the child dies or changes his name, although the contingent determination of the estate before the child's death depends upon an event which may not take place until beyond the limits prescribed by the rule against perpetuities. And it makes no difference whether the provision for termination be expressed in the form of a condition or a limitation. So a remainder to a person ascertained and his heirs after a term of years, however long the term or whatever be the conditions to which the term is subject, is not too remote": *Gray on Perpetuities*, sec. 209.

"It is a general rule in regard to vesting of personal legacies that if there is no independent bequest, but only a direction to pay at a future time or upon the happening of a certain event, the vesting will be postponed until ³⁷ the event has occurred or the time arrived. But the general rule is subject to an exception so well established and universally recognized as to practically constitute another general rule, which is: Though a gift arises wholly out of directions to pay or distribute in futuro, yet, if such payment or distribution is not deferred for reasons personal to the legatee, but merely because the testator desired to appropriate the subject matter of the legacy to the use and benefit of another for and during the life of such other, the

vesting of the gift in remainder will not be postponed, but will vest at once, the right of enjoyment, only, being deferred: *Scofield v. Olcott*, 120 Ill. 362; *Carper v. Crowl*, 149 Ill. 465. The principles which apply to and control vesting of bequests of personal property are in general equally applicable to devises of real estate": *Knight v. Pottgieser*, 176 Ill. 368.

A gift to a person if or when he shall attain a certain age will not vest until that age is attained: *Scofield v. Olcott*, 120 Ill. 362; 2 *Jarman on Wills*, Randolph and Talcott's ed., 458; *Theobald on Wills*, 412; *In re Bennett's Trusts*, 3 Kay & J. 280; *Johnson's Estate*, 185 Pa. St. 179, 64 Am. St. Rep. 621.

"There is a distinction between a gift of a legacy to a person to be paid to him at a future time, and a direction to pay or transfer the legacy to him at a future time. In the former case, the legacy is considered as vesting in him immediately, but, where the gift is merely by a direction to pay to him at a future time, the legacy does not vest forthwith. Until the time arrives he has no vested interest in the bequest": *Scofield v. Olcott*, 120 Ill. 362; *Jones v. MacMilwain*, 1 Russ. 223; *Kingman v. Harmon*, 131 Ill. 171; *Illinois Land etc. Co. v. Bonner*, 75 Ill. 315. Thus, a direction to trustees to pay (transfer, deed, etc.) to certain devisees "when they should arrive at twenty-five years of age," or "upon their becoming twenty-five years of age," has been held to convey a contingent interest, only: *Leake v. Robinson*, 2 Mer. 363. In *Coggin's Appeal*, 124 Pa. St. 35, 10 Am. St. Rep. 565, the court says: "In a doubtful case, it would ^{as} be persuasive, but where the nature of the interest is clear it is entitled to but little weight. There is abundant authority that where the attainment of a certain age forms part of the original description of the devisee, the vesting is suspended until the attainment of that age, even though the limitation over is only to take effect in case of his death under that age without issue."

Had the testatrix closed her will at the end of the seventh clause, it might be held that a reasonable interpretation would be that the grandchildren take a vested interest; but the intention of a testator is to be arrived at, not by considering portions of the will, but by an examination of the entire will or the system of bequest, giving due consideration to each and every part thereof. Courts must construe a will according to its own terms. They cannot make a new will or build up a scheme for the purpose of carrying out what might be thought was or would be in accordance with the wishes of the testa-

tor: *Tilden v. Green*, 130 N. Y. 29, 27 Am. St. Rep. 487; *Lawrence v. Smith*, 163 Ill. 149. It is true that parts of a will which are valid will be sustained though other parts are rejected as invalid, if no violence is done to the parts sustained: *Lawrence v. Smith*, 163 Ill. 149; *Gray on Perpetuities*, secs. 233, 423; *Howe v. Hodge*, 152 Ill. 252; 1 *Jarman on Wills*, 4th ed., 297. But this rule should apply only when the first gift is absolute. And bequests of a will valid in themselves will be rejected with the invalid ones where the retention of them would defeat the testator's wishes, as evidenced by the general scheme adopted, or where manifest injustice would result to the beneficiaries: *Lawrence v. Smith*, 163 Ill. 149.

In the light of the above authorities, an examination of the subsequent provisions of this will indicates to us clearly that the testatrix did not intend that the grandchildren should take a vested interest. By the eighth and ninth clauses it is provided that if one or both grandchildren should die without leaving legitimate child or ^{or} children, his or their estate shall be paid to the survivor or survivors upon reaching the age of twenty-five years. By the tenth clause it is provided that if any grandchild shall die before arriving at twenty-five years of age, leaving legitimate child or children, then the executor shall, upon said child or children becoming twenty-five years of age, respectively, give, transfer, and deliver to said child, or equally divide among said children, their said father's share which he would have received under the will in case he had lived. If any effect is to be given to these clauses whatever, they mean that the right of either of the three grandchildren to enjoy the property devised to them, respectively, is contingent upon their reaching the age of twenty-five years, and that, failing to do so but leaving issue, their respective issue shall not enjoy the property until they shall arrive at the age of twenty-five years. These clauses, taken together, comprise one entire, clear, and distinct scheme of devise, and it were to do violence to the will to reject any one of them in the construction of the others. The eleventh, twelfth, and thirteenth clauses of item 2 strengthen the views we have above expressed.

In *Lawrence v. Smith*, 163 Ill. 149, above cited, this court said: "We see no way by which a division of the trust created by this will can be made, and part held valid and the rest invalid, without doing violence to the intention of the testator. It is all one entire scheme, and, although the trust is an instrument to effect the beneficial purpose of the testator, it is made

the most prominent feature of the will": See, also, *Post v. Rohrbach*, 142 Ill. 600.

In *Tilden v. Green*, 130 N. Y. 29, 27 Am. St. Rep. 487, the court, after reviewing a number of authorities, say: "The rule as applied in all reported cases recognizes this limitation: that when some of the trusts in a will are legal and some illegal, if they are so connected together as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion was retained and other ⁴⁰ portions rejected, . . . then all the trusts must be construed together and all must be held illegal and must fall."

In *Matter of Will of Butterfield*, 133 N. Y. 473, the court, while holding that a valid testamentary trust may be relieved from the peril of some unlawful incident or limitation by disregarding it, say: "This can only be done where the vicious provision is clearly separable from the valid demise or trust, and may be disregarded without maiming the general frame of the will or the testator's substantial and dominant purpose."

In *Johnson's Estate*, 185 Pa. St. 179, 64 Am. St. Rep. 621, a testator devised his real estate to his executors in trust for the period of seventy-five years, giving to the executors power in the management of the estate, and directing them to pay all charges against the land, and all legacies, out of the rents and profits. After all the charges and legacies were paid out of the rents, he directed his children to select a trustee, and directed that such trustee should collect the rents and profits of the land, and after paying for repairs and taxes should distribute the balance to his children and their legal descendants until the expiration of the seventy-five years, at the expiration of which time the trustee was authorized to sell the land, and the proceeds were to be distributed "to and among all my children, share and share alike, that may be then living, and the legal descendants of any of my said children that may be then dead, the legal descendants of such deceased child or children to take, however, only such share and portion of the said proceeds as their deceased parent would have taken if then living." It was held: 1. That the particular devise—the term of seventy-five years given to the trustee—did not violate the rule against perpetuities; 2. That the gift of the ulterior estate in remainder was a future contingent interest, repugnant to the rule against perpetuities, and therefore void for remoteness; 3. That as the testator's general scheme ⁴¹ was to keep his estate entire for an unlawful period, and as the particular estate was created for this

purpose only, the particular estate must fall with the ulterior estate; 4. That the testator died intestate as to his real estate, which accordingly passed at his death to his heirs at law. The above rule has been applied in *Fosdick v. Fosdick*, 6 Allen, 48, and *In re Walkerly*, 108 Cal. 627, 49 Am. St. Rep. 97.

The rule being that if provisions of a testamentary character are such that under them a violation of the rule against perpetuities may possibly happen the devise is void, it is clear that the tenth provision of item 1 offends this rule, as providing for a disposition of the estate upon contingencies which may not happen within the life or lives of persons in being or twenty-one years thereafter, and it follows that all of item 1 of the will after the first and second clauses must be treated as void: *Gray on Perpetuities*, sec. 207; *Jarman on Wills*, 814.

We find no error in the decree of the circuit court of Greene county as rendered, and the same is affirmed.

CARTWRIGHT, C. J., dissenting. I do not concur in setting aside the entire will on account of the invalidity of the tenth clause, which is the only one violating the rule against perpetuities. The fourth, fifth, and sixth clauses devise separate specific tracts of real estate upon contingencies which are lawful. The testatrix separated the gifts and the contingencies upon which they are limited, and the provisions of the will are independent of each other. The wishes of the testatrix should be sustained if possible, and in such a case there is no difficulty in upholding the valid provisions: *Gray on Perpetuities*, secs. 341-355; *Howe v. Hodge*, 152 Ill. 252; *Lawrence v. Smith*, 163 Ill. 149.

WILLS, CONSTRUCTION.—The intent of a testator is to be determined from the whole will, and every word is to be given effect if it can be done without defeating the general purpose of the will: *Succession of Allen*, 48 La. Ann. 1036, 55 Am. St. Rep. 295; *L'Etoile-neau v. Henquet*, 89 Mich. 428, 28 Am. St. Rep. 310.

LEGACIES, VESTING OF.—A legacy is vested if the time of payment merely is postponed, and it appears to be the intention of the testator that his bounty shall attach immediately; but it is contingent if the time is annexed to the substance of the gift as a condition precedent: *Ducker v. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135, and note. A bequest to one of a sum of money to be paid to him if or when he shall attain the age of twenty-one years vests at once on the death of the testator: See extended note to *Goebel v. Wolf*, 10 Am. St. Rep. 473. Compare pages 477 and 478 of the same note.

WILLS—PERPETUITIES.—If a part of the testator's general scheme is that an estate shall be kept entire for an unlawful period, no part of the scheme can be sustained; but it is otherwise if the

valid part of the will is so far independent of the invalid that it would stand had the testator been aware of the invalidity of the rest: *Johnston's Estate*, 185 Pa. St. 179, 64 Am. St. Rep. 621. See, too, *Tilden v. Green*, 130 N. Y. 29, 27 Am. St. Rep. 487, and the extended note to *Johnston's Estate*, 64 Am. St. Rep. 634-646, discussing the severability of perpetuities and forbidden trusts.

CHICAGO v. NETCHER.

[188 ILLINOIS, 104.]

MUNICIPAL CORPORATIONS—VOID ORDINANCES.—An ordinance making it unlawful for any "person, firm, or corporation, engaged in selling drygoods, clothing, jewelry, and drugs, to have exposed for sale, or sell to any person, firm, or corporation, any meats, fish, butter, cheese, lard, vegetables, or any other provisions, is not a health regulation, but a purely arbitrary prohibition, and void as an interference with property rights guaranteed by both the state and the federal constitutions.

CONSTITUTIONAL LAW—VOID ORDINANCES.—If an owner is deprived by municipal ordinance of the right to expose for sale and sell his property, when the sale thereof is not injurious, he is deprived of property within the meaning of the constitutional inhibition by taking away one of the incidents of ownership.

CONSTITUTIONAL LAW—POLICE POWER.—In order to sustain legislative interference with the business of the citizen by virtue of the police power, either under a statute or a municipal ordinance, it is necessary that the act should have some reasonable relation to the subjects included in such power. It must tend in some degree toward the prevention of offenses, or preservation of the public health, morals, safety, or welfare.

CONSTITUTIONAL LAW—DISCRIMINATION.—An attempt by statute or municipal ordinance to deny a property right to a particular class in the community, where all other members of the community are left free to enjoy it, is unconstitutional and void.

MUNICIPAL CORPORATIONS—VOID ORDINANCES—SALE OF INTOXICATING LIQUORS.—A municipal ordinance making it unlawful for any person, firm, or corporation to expose for sale or sell any intoxicating, malt, or fermented liquor in any place of business where drygoods, clothing, jewelry, or hardware are sold, is unreasonable and void as to a drygoods dealer who sells intoxicating liquor in sealed packages only, and not for consumption on the premises. Such restriction is purely arbitrary, and is an illegal discrimination, not having any connection with and not tending in any way toward the protection of the public against the evils arising from the sale of intoxicating liquors.

C. M. Walker, corporation counsel, and D. E. Sullivan, for the appellant.

Wilson, Moore & McIlvaine, and W. W. Gurley and H. G. Stone, for the appellee.

¹⁰⁸ CARTWRIGHT, C. J. Two prosecutions were instituted before a justice of the peace by the city of Chicago, appellant, against Charles Netcher, appellee, for the violation of two ordinances of said city. In each case he was found guilty and fined twenty-five dollars and costs by the justice. On appeal to the criminal court of Cook county the cases were tried upon agreed statements of fact before the court without a jury. In each case the court held the ordinance upon which the prosecution was based to be void, in propositions of law submitted for that purpose, and found the defendant not guilty. The city prosecuted appeals from these judgments to this court. The cases, being of the same nature and largely involving the same questions of law, have been argued together and will be considered and disposed of in this opinion.

The defendant is the owner of what is known as a "department store," or general store for the sale of different kinds of merchandise, divided into separate departments, in the city of Chicago. The ordinances are directed against stores of that class, and the object of each is to prohibit the sale of certain kinds of merchandise in any store or place of business where certain other kinds of merchandise are sold. One of these ordinances provides as follows: "It shall be unlawful for any person, firm, or corporation doing business in this city, where dry-goods, clothing, jewelry, and drugs are sold, to have exposed for sale, or sell to any person, firm, or corporation, any meats, fish, butter, cheese, lard, vegetables, or any other provisions." The facts agreed upon at the trial for the violation of this ordinance were that the defendant owned, conducted, and operated the store in question, and in the basement and on certain floors exposed for sale, and sold, drygoods, clothing, jewelry, and drugs, and on a different floor, where no such articles ¹⁰⁹ were sold or exposed for sale, he exposed for sale, and sold meats, fish, butter, cheese, lard, vegetables, and other provisions.

The city of Chicago is organized under the general incorporation law, and must find in its charter authority for the exercise of every power which it claims to possess. The authority to pass this ordinance is claimed by virtue of clause 50, section 1, article 5, of said act, which enumerates among the powers of the city council the following: "To regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same": Hurd's Stats. 1895, p. 267. Regulations concerning the sale of provisions have relation to the public health,

and may be necessary or proper for its preservation and the suppression of disease: *Kinsley v. Chicago*, 124 Ill. 359. The clause of the incorporation act relied upon confers upon cities organized under the act the right to regulate the sale of provisions, with the object of promoting or preserving the public health, where the regulation tends to serve that purpose. But this ordinance does not regulate the business of selling provisions nor prescribe the manner in which the business shall be carried on. It merely prohibits persons engaged in the business of selling drygoods, clothing, jewelry, and drugs from selling in their stores the provisions enumerated in the ordinance. It permits a person to sell in any place or manner, provided, only, that he does not at the same time sell certain other things. A dealer may sell provisions at the same place with hardware, furniture, boots and shoes, hats and caps, millinery, books and stationery, crockery and glassware, carpets, confectionery, wooden ware, wall paper, or any other sort of merchandise except dry goods, clothing, jewelry, and drugs. This is not a regulation, but a prohibition, and a purely arbitrary one, which attempts to deprive certain persons of exercising ¹¹⁰ a right which has always been lawful and has been heretofore exercised throughout the state and country without question.

The ordinance is also an attempted interference by the city with rights guaranteed to the defendant by the constitutions of the United States and of this state. The questions involved are not new. They have been before this and other courts throughout this country in numerous cases, and the rights of the citizen, as against such interference, have been frequently defined and uniformly upheld. These constitutions insure to every person liberty and the protection of his property rights, and provide that he shall not be deprived of life, liberty, or property without due process of law. The liberty of the citizen includes the right to acquire property, to own and use it, to buy and sell it. It is a necessary incident to the ownership of property that the owner shall have a right to sell or barter it, and this right is protected by the constitution as such an incident of ownership. When an owner is deprived of the right to expose for sale and sell his property, he is deprived of property, within the meaning of the constitution, by taking away one of the incidents of ownership. Liberty includes the right to pursue such honest calling or avocation as the citizen may choose, subject only to such restrictions as may be necessary for the protection of the public health, morals, safety, and wel-

fare. The state, for the purpose of public protection, may, in the proper exercise of the police power, impose restrictions and regulations, but the right to acquire and dispose of property is subject only to that power. The individual may pursue, without let or hindrance from anyone, all such callings or pursuits as are innocent in themselves and not injurious to the public. These are fundamental rights of every person living under this government. The legislature can neither by an enactment of its own interfere with such rights, nor authorize a municipal corporation to do so: *Frorer v. People*, 111 Ill. 171; *Ramsey v. People*, 142 Ill. 380; *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206; *Cooley's Constitutional Limitations*, 393.

In order to sustain legislative interference with the business of the citizen by virtue of the police power it is necessary that the act should have some reasonable relation to the subjects included in such power. If it is claimed that the statute or ordinance is referable to the police power the court must be able to see that it tends, in some degree, toward the prevention of offenses or the preservation of the public health, morals, safety, or welfare. It must be apparent that some such end is the one actually intended, and that there is some connection between the provisions of the law and such purpose. If it is manifest that the statute or ordinance has no such object, but, under the guise of a police regulation, is an invasion of the property rights of the individual, it is the duty of the court to declare it void: *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206; *Eden v. People*, 161 Ill. 296, 52 Am. St. Rep. 365; *Cooley's Constitutional Limitations*, 577. It is not claimed in the argument for the city that the selling of the different kinds of merchandise mentioned in the ordinance in the same building tends in any way to affect the safety, health, morals, comfort, or welfare of the public. No attempt is made to suggest any grounds upon which the ordinance can be justified as an exercise of the police power of the city or the state. It certainly cannot be contended that there is anything in the character of drygoods, clothing, jewelry, and drugs which renders it dangerous to the public or inimical to the general welfare that they should be sold in the same building with provisions. General stores have always dealt in all kinds of merchandise, and no one has ever imagined that the comfort, safety, or welfare of the public was in any manner or to any extent injured or prejudiced by them. Public health and public comfort are

in no way affected by selling the different kinds of merchandise enumerated in different departments of the same building, and would not be if the same clerk should sell ¹¹² them; nor would the public welfare or comfort be increased by compelling a customer to buy one kind of merchandise in one store and another in some other store. In *Meyers v. Baker*, 120 Ill. 567, 60 Am. Rep. 580, the act prohibiting the establishment of any tent, booth, or place of vending provisions or refreshments within a certain distance of a campmeeting was sustained as a police regulation tending to prevent disturbance or disorderly conduct. But this ordinance has no such purpose. It is plain that its object is not to protect the health, morals, or safety of the public or to accomplish any object falling within the police power. It is a mere attempt to deny a property right to a particular class in the community where all other members of the community are left to enjoy it. It is immaterial whether such a denial is in a statute or in an ordinance passed by virtue of a statute. It is equally invalid in either case.

The other ordinance, under which the second prosecution was begun, provides as follows: "It shall be, and is, unlawful for any person, firm, or corporation to have exposed for sale, or sell, any intoxicating, malt, or fermented liquors in any place of business in the city of Chicago where any drygoods, clothing, jewelry, or hardware are kept or exposed for sale." The agreed statement of facts is, that the defendant kept in his above-mentioned store drygoods, clothing, jewelry, and hardware and exposed them for sale in the basement and on certain floors, and on a different floor kept and exposed for sale, and sold, intoxicating, malt and fermented liquors; that no liquors of any kind were sold to be drunk on the premises, and none were kept except in sealed bottles or jugs, which were delivered to the purchaser at the store or delivered by wagons, and that defendant had complied with all the rules and ordinances of the city, and was entitled to sell intoxicating, malt, and fermented liquors in said store, except so far as he was disqualified and prevented, if at all, by the said ordinance.

¹¹³ The authority of the city to regulate the liquor business is found in clause 46 of said section 1 of article 5 of the incorporation act, as follows: "To license, regulate, and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed, or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted, and to

determine the amount to be paid for such license": Hurd's Statute, 1895, p. 267.

The liquor business is one peculiarly subject to the police power on account of the multitude of evils which result from it. Police regulation of that business has always been sustained, as having for its object the prevention of intemperance, pauperism, and crime, and diminishing, as far as practicable, the injurious consequences to the public resulting from the business. In *Schwuchow v. Chicago*, 68 Ill. 444, it was said: "This business is, on principle, within the police power of the state, and restrictions which may rightfully be imposed upon it might be obnoxious as an illegal restraint of trade when applied to other pursuits." It is clearly within the police power to prohibit all sales of liquor on the ground that "drum drinking is an evil to the person and pernicious to the welfare of the public": *Dennehy v. Chicago*, 120 Ill. 627. The city may also form prohibition districts for the protection of particular neighborhoods from the influence of dram-shops, wherever it is desirable or reasonable that there should be such prohibition, although the sale may be licensed in other parts of the city: *People v. Cregier*, 138 Ill. 401. This ordinance, however, is not an exercise of the police power for the protection of the public from the injurious effects of the liquor business. It is not aimed at the suppression of the business, either in certain localities or upon any ground of police regulation, but is directed solely against the sale by certain persons in their places of business—that is, by those who also sell drygoods, clothing, jewelry, or hardware. The city of Chicago has ¹¹⁴ not seen fit to prohibit the sale of liquor, either generally or in the district of the city where defendant's store is kept. It has established its policy with reference to that business, and defendant has complied with its ordinances so as to be entitled to sell liquor in his store unless this ordinance constitutes a valid prohibition against his doing so. It is apparent that if there is any evil in permitting a sealed bottle of liquor to be sold from a store where drygoods, clothing, jewelry, or hardware are sold, the same evils would result from the sale from any other kind of a store. The ordinance permits the dealer in all kinds of merchandise, except drygoods, clothing, jewelry, and hardware, to sell liquor from his store, and the city cannot arbitrarily discriminate against the defendant without any basis or ground for the discrimination. Special privileges are not to be granted to favored persons in the liquor business any more

than in any other business: *Zanone v. Mound City*, 103 Ill. 552. There are other clerks employed in the other departments of defendant's store, separate and independent from this, but there is no liquor drunk on the premises and none sold there for that purpose, so that the ordinance could not have been intended to prevent making a drinking place where clerks are employed in other lines of business. The restriction is purely arbitrary, not having any connection with and not tending in any way toward the protection of the public against the evils arising from the sale of intoxicating liquor. That was not the object of the ordinance, and the attempted discrimination is illegal and in violation of the defendant's rights.

The criminal court was right in holding both ordinances void, and the judgments are affirmed.

POLICE POWER.—LAWS ENACTED in the exercise of the police power must be police regulations in fact, and if they do not conduce to any legitimate police purpose, but amount to an arbitrary and unwarranted interference with the right of the citizen to pursue any lawful business, they must be declared unconstitutional: *State v. Chicago etc. Ry. Co.*, 68 Minn. 381, 64 Am. St. Rep. 482. Statutes passed in pursuance of the police power must have some relation to the end sought to be accomplished: *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315.

MUNICIPAL CORPORATIONS—ORDINANCES.—Municipalities cannot, under the guise of the police power, adopt regulations which operate to create a monopoly or to restrain trade: *Notes to Jacksonville v. Ledwith*, 23 Am. St. Rep. 582; *State v. Payssan*, 49 Am. St. Rep. 393; neither can they substantially prohibit a lawful trade, unless it is so conducted as to be injurious to the public health: *Note to State v. Taft*, 54 Am. St. Rep. 771. Municipal ordinances regulating sales of commodities must be reasonable and referable to the performance of some recognized governmental function: *Note to Helena v. Dwyer*, 62 Am. St. Rep. 212. See, further, the monographic note to *Hurst v. Warner*, 47 Am. St. Rep. 540-552.

MUNICIPAL CORPORATIONS—SALE OF LIQUORS.—A grant of power to municipal corporations to regulate and restrain liquor dealing does not authorize the enactment of an ordinance under which arbitrary discriminations may be made: *Ex parte Theisen*, 30 Fla. 529, 82 Am. St. Rep. 86.

METZGER v. WOOLDRIDGE.

[133 ILLINOIS, 174.]

JUDGMENT—ENTRY OF FINAL—WHAT IS NOT.—If the only thing appearing in the record on appeal respecting the judgment below is an entry showing an overruling of a motion for a new trial, judgment on the verdict for a certain amount, and the allowance of an appeal, such appeal must be dismissed on motion for want of a final judgment.

A. E. De Mange and J. E. Hoffman, for the appellants.

Moore & Warner, for the appellee.

¹⁷⁶ WILKIN, J. This was an action of assumpsit by appellee, against appellants, in the circuit court of De Witt county. Upon a trial by jury a verdict was returned in favor of the plaintiff for fifteen hundred and twenty-one dollars and nine cents. A motion for a new trial by the defendants was overruled. The only entry of judgment shown by the transcript of the record is: "And the court having heard the motion, court overruled same, and judgment on the verdict for fifteen hundred and twenty-one dollars and nine cents. And now comes the defendant and prays an appeal; an appeal allowed on his giving bond in the sum of three thousand dollars in twenty days, to be approved by the clerk by agreement, and bill of exceptions to be filed in one hundred and twenty days." A transcript of the record was filed in the appellate court, upon which the only errors assigned, questioning the entry of a judgment, were the following: "There is nothing in the record which shows a judgment of the court"; and "the court erred in overruling the motion for new trial and then failing to act by rendering judgment either for plaintiff or defendant." The plaintiff appeared in that court and entered his motion to dismiss the appeal because there was no final judgment, and suggestions were filed in support of that motion, the appellants filing counter suggestions, in which it was insisted that the entry of the judgment below was only defective, and that it should for that reason be reversed. The appellate court, however, sustained the motion and dismissed the appeal, to reverse which order this appeal is prosecuted.

The only question raised here by the assignment of errors is whether the appeal was properly dismissed in ¹⁷⁷ the appellate court. The argument of counsel on behalf of the appellants on that question is based upon the assumption that a

judgment was entered in the circuit court, but that it was defectively written up by the clerk, and they contend that it is not true that no judgment was rendered, as shown by the record. That the entry is in no sense a proper judgment is conceded, but they contend that, the judgment of the court having been announced and the appeal prayed before the attempted entry of the clerk, the appeal was properly taken, and the mere fact that the clerk failed to perform his duty in making the proper entry cannot defeat the right of the appellant to prosecute his appeal.

In the case of *Martin v. Barnhardt*, 39 Ill. 9, the record showed this entry: "Judgment on verdict for three thousand dollars and costs," and we said: "This seems to be no more than a loose memorandum, perhaps made by the judge as a minute on his docket, as a guide to the clerk in making up his record. . . . It does not state by whose or by what authority a judgment was rendered. It fails to state in whose favor or against whom it was rendered, nor does it even award execution." And again: "The judgment of the court below, if it be possible to call it such, is so informal that it must be reversed. But as a careful examination has failed to show any error previous to the finding of the verdict, and inasmuch as it is sufficient to sustain a judgment, we deem it unnecessary to award a venire facias de novo, but we reverse the judgment and remand the cause, with leave to the plaintiff to move the court below for a judgment on the verdict." In that case it does not appear that any motion was there entered to dismiss the appeal, and it seems from the report of the case that the appellant insisted there merely upon the irregularity of the entry of the judgment.

In *Faulk v. Kellums*, 54 Ill. 188, the entry was, after showing the denial of a motion for new trial and in arrest of judgment: "Whereupon the court enters judgment upon ¹⁷⁸ the verdict. And now come the said defendants, by their attorneys, and pray an appeal, which is granted," etc., and we again said: "There is also an objection to the form of this judgment, if judgment it may be called, which is well taken. . . . It has no element of a judgment other than a bare recognition of the finding of the jury. No action of the court was had upon that finding." That judgment was reversed and the cause remanded generally. Here, again, no motion to dismiss the appeal was made.

It is clear that these decisions hold an entry like the one appearing in this transcript is in no proper sense a judgment of the court. Here the assignment of error in the appellate court, as we have seen, is not that an irregular, insufficient, and informal judgment of the circuit court was entered, but that "there is nothing in the record which shows a judgment of the court." The statute being that appeals and writs of error can only be prosecuted to this court or the appellate courts from the final judgments or decrees of trial courts, it is difficult to see how the appellants, under their assignment of error, could sustain their appeal against a motion to dismiss for want of such a final judgment. It is true, as insisted by counsel for appellants, that a judgment is not necessarily what is entered by the clerk, but that which is ordered and considered by the court. But it is also true that on an appeal the transcript of the record must show a final judgment, and that all judgments in courts of record must be in writing, and unless that which is here shown to have been entered by the clerk is a judgment, then manifestly there was nothing to appeal from. It is undoubtedly true that where the record fails to show a proper final judgment, and no error appears prior to the rendering of the verdict, the judgment of the court of review should be as in *Martin v. Barnhardt*, 39 Ill. 9, reversing the judgment and remanding the cause, with leave to the plaintiff to move the court for a judgment on the verdict; ¹⁷⁹ but that practice certainly cannot prevail where there is no judgment from which an appeal could be prosecuted, and a motion has been entered to dismiss for that reason.

We think the appellate court committed no error in sustaining the motion to dismiss, and its judgment will accordingly be affirmed.

AN APPEAL WILL NOT LIE from an order or judgment unless it determines the action or affects some substantial right of one or more of the parties: *Extended note to Davie v. Davie*, 20 Am. St. Rep. 173. See, further, the notes to *Kahn v. Traders' Ins. Co.*, 62 Am. St. Rep. 82; *Holloway v. Holloway*, 10 Am. St. Rep. 349.

LASHER v. PEOPLE.

(188 ILLINOIS, 226.)

CONSTITUTIONAL LAW—POLICE REGULATION.—The legislature has power to form classes for the purpose of police regulation, if it does not arbitrarily discriminate between persons in substantially the same situation.

CONSTITUTIONAL LAW—CLASS LEGISLATION—COMMISSION BUSINESS.—The business of dealing in small products of the farm on commission is of a nature which may be productive of great abuses, and the legislature may put such dealers into a separate class from other commission merchants, and enact regulating laws applicable to cities of such size as in the legislative judgment would permit the existence and growth of such abuses.

CONSTITUTIONAL LAW.—A FRANCHISE is a special privilege granted by the state, which does not belong to citizens of the country, generally by common right. Such is the meaning of the word "franchise" in a constitutional provision prohibiting the passage of any special law granting any special franchise to any corporation, association, or individual.

CONSTITUTIONAL LAW — FRANCHISES — APPOINTMENT TO OFFICE.—The power to appoint to a public state office is a franchise, and cannot be granted by the legislature to a private corporation or set of corporations, under a constitutional provision prohibiting the passage of any special law granting any special franchise to any corporation.

Darrow, Thomas & Thompson, for the appellants.

E. C. Akin, attorney general, C. S. Deneen, state's attorney, and W. M. McEwen, for the people.

²²⁵ **CARTWRIGHT, C. J.** Plaintiffs in error in these two cases were defendants in the criminal court of Cook county under indictments charging them with the violation of "An act to regulate the shipping, consignment, and sale of produce, fruits, vegetables, butter, eggs, poultry, or other products or property, and to license and regulate commission merchants and to create a board of inspectors and to prescribe its powers and duties," in force April 24, 1899. The indictment against Charles W. Lasher charged him with soliciting consignments of butter and eggs for sale on commission as a commission merchant without procuring a license from the board of inspectors of the state of Illinois to carry on said business. Edward C. Reichwald and William G. Reichwald were charged in the indictment against them with receiving on consignment for sale on commission, as commission merchants, certain green and deciduous fruits, consisting of grapes, ²²⁶ plums, and peaches, without first procuring such license. The defendants were

tried before the court without a jury, and they raised the question of the validity of the statute providing for a board of inspectors and a license to be issued by such board, both by motions to quash the indictments and by propositions of law submitted to the court. The charges in the indictments were proved on the trials and were not disputed. The court held the law valid, fined the defendants and entered judgments against them.

The first section of the act in question provides for making reports to consignors and remitting to them the proceeds of sale, with itemized statements, and for keeping records of transactions. The second section imposes a penalty for violating any of the provisions of the act. Sections 3 to 8, inclusive, are as follows:

"Sec. 3. That a board of inspectors is hereby created, to be composed of one member from each of the following organizations: Illinois State Horticultural Society, Illinois State Dairy-men's Association, Illinois State Retail Dealers' Association, Chicago Butter and Egg Board, and Chicago branch of National League of Commission Merchants. In case any of the aforesaid organizations are not incorporated under the laws of the state of Illinois at the time of going into effect of this act, they shall not be disqualified from furnishing said members if the incorporation is completed on or before January 1, 1900. The members of said board of inspectors shall be selected from the membership of said organizations by the members thereof at some regular or special meeting at which there shall be a quorum, and shall serve for a period of one year. In case of the failure or refusal of any such organization to so elect a member of such board of inspectors, it shall be the duty of the remaining members of said board to fill such vacancy by the selection of some person representing the line of business the representative organization of which has failed or refused to so ²³⁰ elect. Each member of said board shall receive as his compensation the sum of ten dollars (\$10) for each session attended, and ten cents per mile additional when required to travel a distance of more than ten miles to attend such meeting.

"Sec. 4. Said board of inspectors shall organize by electing from their number a president, a vice-president, and a treasurer, and may appoint a secretary, and, if needed, two inspectors, such secretary and inspectors to be compensated by said board. It shall be the duty of the secretary to receive complaints regarding the disposition of the articles of country pro-

duce shipped on commission to licensed receivers, and instruct inspectors to investigate the same, and make a report to be submitted to said board at its next regular meeting.

"Sec. 5. Said board shall meet monthly on the second Wednesday of each month for the purpose of transacting such business as may come before them; and said board is hereby authorized to provide a room or place of meeting and for permanent headquarters in the city of Chicago at an annual rental of not more than seven hundred and fifty dollars (\$750), said rent to be paid from the funds of said board. A detailed statement of all expenditures of the board shall be made to the governor each year.

"Sec. 6. Every person, firm, or corporation in the state of Illinois, doing business in a city of more than fifty thousand population, receiving on consignment for sale on commission butter, eggs, poultry, game, dressed calf, green and deciduous fruits, berries, and other commodities the product of the farm, with the exception of grains, livestock, and dressed meats, shall first procure from the board a license to carry on said business, for which said party or parties shall pay into the state treasury the sum of twenty-five dollars (\$25) annually, said license to be renewed annually.

"Sec. 7. The board shall have power to prescribe a system of books and accounts to be kept by licensed ²³¹ commission receivers, and said inspectors and members of said board, or duly authorized agents of said board, shall have access to such books, accounts, and memoranda upon demand, and have power to send for books and papers and examine under oath. Any refusal upon the part of said licensed dealers to exhibit such said books, accounts, or memoranda, when called upon to do so by such legally constituted authorities, shall forfeit the license held, which shall not be reissued inside of three months without unanimous consent of said board.

"Sec. 8. It shall be unlawful for any person, firm, or corporation to receive or solicit consignments of such country produce as is mentioned in this act without first obtaining such license, and violators shall be fined not less than fifty dollars nor more than two hundred dollars, and it shall be the duty of the state's attorney of the county wherein prosecutions are brought to prosecute such violations, and the board may, at its discretion, employ such counsel as they may deem necessary for the prosecution of such violation."

The remainder of the act makes provision for the prosecution of offenses and the revocation of licenses by the board, requires the payment of a fee of one dollar by any person making complaint, which is to be turned over to the treasurer of the state, and provides for the payment of expenses of the board out of the state treasury.

It is first argued that the statute is invalid as discriminating between commission merchants, because it excepts those who deal in grain, livestock and dressed meats. The claim is, that produce commission merchants constitute a class, and that the legislature must require a license from all or none. This objection to the law is not valid. The legislature have power to form classes for the purpose of police regulation, if they do not arbitrarily discriminate between persons in substantially the same situation. The discrimination must rest upon some reasonable ground of difference, but the classification in ²³² this case is a natural one. The commission merchants dealing in the kinds of produce named in this act, which constitute the small products of the farm, are of a different class from those who transact business in the great markets for the sale of grain, livestock, and dressed meats. The state laws for the inspection of grain provide for the protection of shippers in that market, and there is also state inspection of livestock and dressed meats. The law which classifies small commission merchants engaged in the produce commission business rests upon a reasonable ground as a basis for the classification. Such a business may afford great opportunities for swindling, and be productive of great abuses, and the legislature may properly enact a law applying to cities of such size as in the legislative judgment would permit the growth and existence of such abuses.

Another ground of objection made to the act is, that the provisions which create a board of inspectors with power to grant licenses, and which require commission merchants to procure such licenses and impose a penalty for the failure to do so, are void, as repugnant to section 22 of article 4 of the constitution, which prohibits the legislature from passing any law granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. The provisions in question are special in their nature, and the act names five corporations upon which it confers the power to appoint a board of inspectors to be selected from the membership of such corporations. If the power to appoint such a board of inspectors constitutes a franchise, then there can be no doubt that the

legislature had no power to confer such a franchise upon the corporations named in the act. A franchise has been often defined, so that the meaning of the term is well settled. Blackstone's definition is: "A royal privilege or branch of the king's prerogative subsisting in the hands of a subject": 2 Blackstone's Commentaries, 21. In this country it is a special ²³³ privilege granted by the state, which does not belong to citizens of the country generally by common right. This is the distinguishing feature of a franchise. A right which belongs to the government when conferred upon the citizen is a franchise. No one can exercise the right of eminent domain, or establish a highway or railway and charge tolls for the same, without a grant from the legislature. Such rights as inhere in the sovereign power can only be exercised by the individual or corporation by virtue of a grant from such sovereign power, and when the state grants such a right it is a franchise: Board of Trade v. People, 91 Ill. 80; People v. Holtz, 92 Ill. 426. In the former of these cases the distinction between a franchise and a privilege which belongs to the citizen of common right was pointed out, and in the latter case it was said: "If the constitutional convention and the general assembly used the term according with its strict legal import—and we must suppose they did—then, in this country, it can only embrace corporations, ferries, bridges, wharfs, and the like; and we may add the elective franchise, as it is granted by the constitution to a portion of the people to elect their officers." A franchise must be granted by the legislature, and a municipal body cannot confer a franchise: Chicago etc. Ry. Co. v. People, 73 Ill. 541; Metropolitan etc. Ry. Co. v. Chicago etc. Ry. Co., 87 Ill. 317. Now, the power to appoint to office in a monarchy is a royal privilege or branch of the king's prerogative. It is an attribute of sovereignty, and does not belong to citizens generally, by common right. Blackstone includes this power among the prerogatives of the king, and says that offices are in his disposal as sovereign: 1 Blackstone's Commentaries, 272. The power to appoint to office is within the definition of Blackstone, which was adopted in the cases above referred to. In this state the people, in their sovereign capacity, through the constitution, conferred the elective franchise upon a portion of the citizens having certain qualifications, as was said in ²³⁴ People v. Holtz, 92 Ill. 426. The general assembly was prohibited from exercising the power of appointment, and as to certain other officers the following provision was made: "The governor shall nominate, and by and with the ad-

vice and consent of the senate (a majority of all the senators selected concurring, by yeas and nays), appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for; and no such officer shall be appointed or elected by the general assembly": Const., art. 5, sec. 10. Appointment to office is a large part of the official power belonging to the governor, under our constitution, as the chief executive. Under a somewhat similar prohibition against the exercise of the appointing power by the general assembly, it was held in *State v. Kennon*, 7 Ohio St. 546, that the legislature had no power to confer upon three persons named by the legislature the power to appoint certain officers. No private corporation and no individual has the power of appointment to any office as a matter of common right, and cannot have any such power except by virtue of a legislative grant.

In *People v. Holtz*, 92 Ill. 426, it was held that an office is not a franchise, and it is argued that consequently the power to appoint to office is not a franchise, privilege, or immunity. It does not follow that because the office is not a franchise the power to appoint to it is not. The power of appointment to an office and the office itself are entirely distinct and of a different nature. A citizen may hold the title to an office and perform its functions, but the power to create the office and designate such functions and fill the office must rest in the government or some governmental agency.

But it is said that these inspectors are not officers of the state because they exercise their duties within the limits of cities of more than fifty thousand population, and that we have sustained laws investing officers of the ²³⁵ judicial department with the power to appoint local or municipal officers. These inspectors are authorized to perform their duties throughout the state wherever there is a city of more than fifty thousand population. A law applying to cities of such size is considered general, operating throughout the state, because its provisions will apply wherever there may be such a city. These officers are required to report to the governor each year, their license fees and fees for complaints are turned into the state treasury, and the expenses are paid out of the state treasury. Our constitution defines an office as follows: "An office is a public position created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed. An employment is an agency, for

a temporary purpose, which ceases when that purpose is accomplished": Const., art. 5, sec. 24. These officers serve for the period of one year, and are appointed annually. The board is a state board, and is so described in each indictment. The cases relied upon to sustain this law relate to local and municipal officers, and do not hold that the legislature may vest the power of appointment in private corporations. The power in each case was vested in a branch of the state government. The statute passed upon in *People v. Morgan*, 90 Ill. 558, authorized the judges of the circuit court of Cook county to fill vacancies in the offices of South Park commissioners, and the election law which was sustained in *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, provided that the judge of the county court might appoint election commissioners. The question mainly discussed in those cases was whether the power of appointment could be exercised by the judicial branch of the government, and in each case the law providing for the appointment was adopted by a vote of the municipality affected. With reference to the appointment of South Park commissioners it was said that the power might, no doubt, be sustained on the ground ²³⁶ that its exercise was the act of an individual who was the incumbent of the office of judge; but that statement, if entirely accurate, should be taken with reference to a case where the people had adopted a law containing a provision for such an appointment. The case was decided and the law sustained on the ground that the legislature might authorize a judicial officer to exercise the power as to a local officer. We have not been referred to any case where the legislature has attempted to confer the power of appointment upon a private corporation. So far as appears, such a law is without precedent in this state. In *Bunn v. People*, 45 Ill. 397, it was held that the commissioners appointed under the act for the erection of a new statehouse were not officers but employes of the state, and in *Kilgour v. Drainage Commrs.*, 111 Ill. 342, and *People v. Inglis*, 161 Ill. 256, it was held that the legislature might impose new duties upon officers already elected, and that the imposition of such new duties was not the appointment of an officer. They have no bearing on the question involved here.

The board of inspectors provided for by this act are general officers of the state, and it seems beyond question that the power to appoint them is a franchise, which the act in question attempts to grant to five corporations. The legislature was powerless to clothe these corporations with an attribute of sov-

ereignty by granting to them this special privilege. The criminal court was wrong in holding the provisions in question to be valid.

We see no objection to the first and second sections of the act, which are separable from the invalid provisions.

The judgments are reversed.

STATUTES—DISCRIMINATION.—The local character of a statute does not necessarily make it unconstitutional. It is sufficient that the statute applies equally to all persons within the territorial limits described in the act: *Summerville v. Pressley*, 33 S. C. 56, 26 Am. St. Rep. 659. Moreover, laws may be confined to a particular class of persons, if general in their application to the class to which they apply, and the distinction is not arbitrary, but based on public policy: See extended note to *State v. Ellet*, 21 Am. St. Rep. 785; *State v. Broadbelt*, 89 Md. 565, 73 Am. St. Rep. 201, and note.

A FRANCHISE IS A SPECIAL PRIVILEGE conferred by the government upon individuals, which does not belong to a citizen by common right: *State v. Scougal*, 3 S. Dak. 55, 44 Am. St. Rep. 756.

OFFICERS, APPOINTMENT OF.—The legislature may, unless inhibited by the constitution, after creating an office, provide that it may be filled by appointment by any person or by the members of any voluntary association: See extended note to *People v. Freeman*, 13 Am. St. Rep. 130.

LYNN v. SENTEL.

[188 ILLINOIS, 382.]

HOMESTEADS—ABANDONED WIFE.—A wife, upon being abandoned by her husband, succeeds to the homestead estate as the head of the family.

DIVORCE—FOREIGN—EFFECT ON WIFE'S HOMESTEAD.—If a husband abandons his wife and removes to a foreign jurisdiction, and there obtains a divorce upon constructive notice, the decree is not conclusive against his wife so as to bar a homestead or other property right or estate acquired by her prior to the date of the decree.

DIVORCE, FOREIGN—EFFECT ON DOWER RIGHTS.—A statute providing for the forfeiture of the dower rights of a wife if a divorce is granted her husband for her fault does not apply when the divorce is granted in a foreign jurisdiction upon notice by publication, and for a cause not recognized as ground for divorce by the statute of her domicile.

HOMESTEADS—ABANDONMENT.—After a homestead has once been acquired, a temporary absence therefrom, with an intention of returning, is not an abandonment.

JUDICIAL SALES—PURCHASER WITH NOTICE.—If a judgment is obtained against a husband after he has abandoned his wife and obtained a divorce from her in a foreign jurisdiction, upon notice by publication, the purchaser of land sold under execution

issued upon such judgment, or his assignee, is not an innocent purchaser without notice, as against the homestead rights of the wife, who is in exclusive possession of the premises.

E. J. Miller, for the appellant.

J. V. Burns and F. Spitler, for the appellees.

³⁸⁵ WILKIN, J. The contention of plaintiff in error is, that her homestead estate has continued to the present and is complete; that the judgments obtained against her husband, the holder of the legal title, were illegal, but if legal did ³⁸⁷ not affect her homestead; that the divorce of her husband in Missouri, in 1894, was fraudulently obtained, and void, but even if valid could not affect her homestead rights in Illinois. Counsel for defendants in error take the opposite view of each of these contentions.

There is no dispute that Margaret Lynn, upon being abandoned by her husband, under the statute succeeded to the homestead estate as the head of the family, and continued in that right up to the date of the divorce in Missouri, in 1894. The chief inquiry is, What was the effect of the divorce upon her homestead? For the purposes of this decision it is unnecessary for us to consider whether or not there was fraud in obtaining that decree, as we shall base our conclusion upon other grounds.

It appears the divorce was granted upon notice by publication, the wife having no actual notice of the suit and not appearing therein. The authorities are to the effect that every state reserves the right to regulate and control the marriage status of all persons within its jurisdiction, even though, at the time, one of the parties to the marriage may reside in another state. And where a husband abandons his wife and removes to a foreign jurisdiction, and there obtains a divorce upon constructive notice merely, such decree is not conclusive against the wife so as to bar a homestead or other property right or estate acquired by her before the date of the decree. The decree of divorce, in other words, serves to dissolve the marriage relation, but it cannot affect property rights beyond the jurisdiction of the court: *Doerr v. Forsythe*, 50 Ohio St. 726, 40 Am. St. Rep. 703; *Doughty v. Doughty*, 28 N. J. Eq. 581; *Thurston v. Thurston*, 58 Minn. 279; *Cook v. Cook*, 56 Wis. 195, 43 Am. Rep. 706, and cases cited.

In *Doerr v. Forsythe*, 50 Ohio St. 726, 40 Am. St. Rep. 703, the husband, Isaac M. Wood, separated from his wife in Ohio and went to Indiana, taking up his residence there, where he

afterward obtained a divorce, the wife being served by publication notices. Upon his death the wife brought her suit for dower in the ~~some~~ lands in Ohio and recovered a decree. The court said: "The decree of divorce granted the husband in the state of Indiana acted only on the marital relation between the parties, and did not affect nor purport to affect the property rights of the wife in the state of Ohio. For aught that appears, the divorce may have been granted on some ground not recognized as a ground for divorce by the laws of this state, so that it cannot be said that it was granted for any aggression of hers, within the meaning of section 5700 of the Revised Statutes. But if it were otherwise, as she had no opportunity to defend, all that can be claimed for that decree is, that it dissolved the marriage relation between the parties and restored the husband to the status of an unmarried man. This the court could do. But as it had no jurisdiction of the person of the wife, it was not competent to the Indiana court to affect such rights as she had acquired in the property of the husband under the laws of this state": Citing cases. In *Doughty v. Doughty*, 28 N. J. Eq. 581, it was held: "A decree in a divorce suit will have no extraterritorial effect when the defendant is domiciled in another state and is not served with process nor with notice of the proceedings. A decree for divorce, to be entitled to extraterritorial effect when the person of the defendant is without the jurisdiction, must be obtained in a manner consistent with natural justice, and such decree is enforced in another state only on the ground of comity." The question is a new one in this state, but the rule announced has the sanction of current authority.

It is contended by counsel for defendants in error that this is not the recognized law in Illinois; that we have held a foreign decree, upon substituted service, sufficient to divest property rights in such cases in this state; and they rely, in part, upon *Dunham v. Dunham*, 162 Ill. 589, and *Knowlton v. Knowlton*, 155 Ill. 158. These cases recognize the principle just announced, that the foreign jurisdiction can dissolve the marriage relation, it having ~~some~~ jurisdiction over one of the parties, but do not in any way assume to pass upon the effect of such a foreign divorce upon property rights here.

The further contention is made that the Missouri divorce was obtained because of the fault of the wife, and, under section 14 of the dower act, she has forfeited her homestead and all other rights acquired as the wife of Caleb Lynn. The rule already announced is an answer to this contention also, because of

the substituted service. But even supposing the wife were subject to the jurisdiction of the court in Missouri, the petition there filed asked relief upon a ground not recognized by our statute as a cause for divorce, the charge being, substantially, incompatibility of temper; and it would be unreasonable to say this section of the statute contemplates a fault which is not recognized as such by our own laws. In support of this last contention much reliance is placed by counsel upon the case of *Rendleman v. Rendleman*, 118 Ill. 257. That case is not in point here, for the reasons that there the parties to the proceedings for divorce in the foreign jurisdiction were both in court in person; the ground relied upon for the divorce was one recognized as a fault and as a cause for divorce by the laws of this state; and the decree there provided that a sum of money be paid to the wife (although she was at fault) "in full of all claims, right of dower, or otherwise, in the property, whether personal or real, of the husband." The question before the court there arose in an ejectment proceeding, and the wife was in the attitude of having received a sum of money in lieu of her property rights and afterward insisting upon claiming them.

The doctrine contended for by defendants in error is, to our minds, wholly irreconcilable with a proper sense of right and justice. The logical effect of holding this property liable for the debts of the husband would be to maintain that upon abandoning her and obtaining a divorce in Missouri the husband could have immediately ³⁹⁰ returned to Illinois and himself ousted the wife of the homestead and all other property rights in his estate, because, forsooth, the Missouri court, having jurisdiction of his person, without actual notice to her, had decreed that she was so at fault in her marital relations to him that he was entitled to a divorce. It requires but little reflection and no ingenuity to show that under such a rule husbands or wives could successfully consummate a most outrageous wrong upon the other without the possibility of defense. Upon these considerations we hold the estate of homestead in Margaret Lynn unaffected by the Missouri divorce.

The remaining question is, Did the wife lose her homestead estate after that time? She was, as stated, temporarily away from it, but part of her household goods were left there and she was at all times in possession and control. From the evidence it appears she did not leave it with the intention of abandoning her homestead estate. We have often held that after home-

stead has once been acquired, a temporary absence therefrom, with an intention of returning, is not an abandonment. Her homestead estate being perfect at the date of the judgments rendered against her husband, the latter were not a lien upon and in no way affected it.

The judgments and sale are questioned. They appear to have been irregular, yet it is not necessary to further notice them.

Defendant in error Sentel can have no rights founded on his being an innocent purchaser for value without notice. Margaret Lynn being in possession of the premises, he and all other parties were chargeable with notice of her rights. The property was not legally liable to execution on judgments against Caleb Lynn.

The decree of the circuit court will be reversed and the cause remanded, with directions to proceed in conformity with the views here expressed.

HOMESTEAD—ABANDONMENT.—To prove abandonment of a homestead, there must be shown an intention to abandon it and an actual abandonment: *Edwards v. Reid*, 39 Neb. 645, 42 Am. St. Rep. 607. The husband's desertion of his wife and family cannot deprive them of their rights to the homestead, or operate as an abandonment as to them: See extended note to *Taylor v. Har-gous*, 60 Am. Dec. 613.

DIVORCE, FOREIGN—PROPERTY RIGHTS.—A decree of divorce granted in another state against a wife over whom the court did not have jurisdiction, while it may dissolve the marriage relation existing between the parties cannot affect her rights in the property of her husband situate in this state: *Doerr v. Forsythe*, 50 Ohio St. 728, 40 Am. St. Rep. 703.

DIVORCE, FOREIGN—DOWER.—A statute of New York declaring that a wife shall not be entitled to dower if a divorce is granted against her is not applicable to a decree rendered in another state, based upon a cause which would not entitle the husband to a divorce in New York: *Van Cleaf v. Burnes*, 118 N. Y. 549, 16 Am. St. Rep. 782. See, too, *McCreery v. Davis*, 44 S. C. 195, 51 Am. St. Rep. 794.

CLARK v. CLARK.

[188 ILLINOIS, 448.]

DEEDS.—DELIVERY OF A DEED by the grantor to a third person, with directions to deliver it to the grantee when he shall call for it, is a valid and sufficient delivery although the grantor, several days subsequent thereto, takes the deed from the depository and himself hands it to the grantee. In such case, the delivery to the grantee relates back to the delivery to the depository, unless the rights of third parties have intervened.

DEEDS—DELIVERY TO THIRD PERSON.—Acceptance of a deed by the grantee relates back to the time of its delivery to a third person for him, although he was not then aware of its execution, if he had assented thereto, and no rights of third parties had intervened.

DOWER—CONVEYANCE BEFORE MARRIAGE—FRAUD. A deed executed the day previous to the grantor's marriage is not in fraud of his wife's inchoate right of dower, if she, with full knowledge of such deed, accepts a life estate in other property of the husband equal to her dower and homestead interests.

J. McNutt, Jr., and J. W. & E. C. Craig, for the appellant.

Neal & Wiley, for the appellee.

⁴⁴⁸ **BOGGS, J.** This is an appeal from a decree declaring the appellee entitled to dower in certain lands owned by the appellant. Appellee was the second wife of one William Clark, who departed this life on the first day of February, 1898. The deceased was the father of five children by a former wife, one of whom is the appellant. The deceased and appellee were married on the nineteenth day of August, ⁴⁴⁹ 1890, and, for some reason not clearly disclosed by the record, a second marriage ceremony was performed on the second day of September, 1890. On the eighteenth day of August, 1890—the day preceding the solemnization of the first ceremony between the appellee and the said deceased—the deceased, who was the owner of two hundred and twenty-five acres of land in Coles county, executed five deeds, one to each of his living children and one to the descendants of a deceased daughter, conveying by each deed twenty-four acres of said land. These deeds were without consideration other than paternal affection. The decree in this case awards dower to appellee in the tract so conveyed by deceased to his son, the appellant.

It is sought to uphold the decree on two grounds: 1. That the deed to appellant was not delivered and did not become operative until after the marriage; 2. The conveyance was in fraud of the inchoate right of the appellee to dower in the land conveyed.

Appellee testified that on the said eighteenth day of August, 1890, the day preceding her marriage to the said deceased grantor, she and the grantor, her intended husband, went together to Mattoon; that they stopped at the home of deceased, and he got some papers and told her he intended going to Mr. Craig's office while they were in Mattoon, to have some deeds made, and she testified she was not sure but that he told her what property it was he was going to convey by the deeds; that they went to Mattoon together, and while there he told her he was going to Mr. Craig's office, and he left her and she did not go with him. It was proven by the testimony of Isaac B. Craig, who is a member of the bar and a notary public, the deceased came to his office on that day and directed him to prepare five deeds conveying certain tracts of land to children and grandchildren of said deceased; that the witness prepared the deeds as directed and that the same were duly signed and acknowledged by the deceased, and when so completed were delivered by the deceased to the ⁴⁵⁰ said witness, with instructions to deliver them to the appellant, who the deceased said would call and get them; that one of the deeds purported to convey the land involved in this suit to the appellant; that some days later the deceased came again to the office of the witness and inquired if the appellant had called for and obtained the deeds; that witness replied that the appellant had not called for the deeds, and the deceased then asked the witness to give the deeds to him and he would take them to the appellant, and that the witness, Craig, then handed the deeds to deceased. The appellee testified she and the deceased were married on Tuesday, the next day after they were in Mattoon, and that on the next Saturday the deceased went to Mattoon and brought home some papers which he told her were deeds he had made to his children, and gave them to her to put with other papers; that some days afterward, but during the same month, she and the deceased were intending to go to Mattoon; that in doing so they would pass the residence of the appellant; that the deceased told her to get the deeds and he would give them to the appellant as they went to Mattoon; that when they arrived at the residence of the appellant she held the horse they were driving while the deceased went to the door of appellant's home and gave the deeds to appellant. It was further proven the appellant brought all the deeds and handed them to Mr. Craig, who was attorney for both the deceased and the appellant, and directed Mr. Craig to have them recorded; that all the deeds

were recorded on the twenty-second day of October, 1890; that the grantees therein immediately went into possession of the respective tracts conveyed to them, and remained in possession and enjoyed the use, rents, and profits thereof thenceforth during the remainder of the lifetime of the deceased, a period of about eight years.

The decree proceeded upon the theory the deed to the appellant was not delivered and accepted until the occasion when the deceased handed the same to the appellant ⁴⁵¹ at the home of the latter, as testified to by the appellee, which was after the marriage. We do not so understand the facts to be. We think the testimony of Mr. Craig establishes beyond controversy the deeds (including that to appellant) were finally and irrevocably delivered by the deceased to the witness Craig on the day of their execution, with instructions to deliver them to the appellant, and that the deceased did not reserve or intend to reserve any right of control over them after so delivering them to Mr. Craig. There is nothing in the proof tending to show the grantor expected to again come into the possession of the deeds, but, on the contrary, the proof is he intended and expected the deeds would pass to the grantees therein from the hands of Craig. When he returned to the office of the witness Craig, he did not know but that the appellant had called and secured the deeds. On being informed the deeds had not passed into the possession of appellant, he concluded to convey them himself to the appellant. He received them from Craig for that purpose and for that purpose only, and did convey them to the appellant and placed them in his possession. His dominion over the deeds ceased when he delivered them to Craig. That delivery was unconditional, and he did not assert or intend to retain further right of control over them. It is unimportant that the deeds came again into his hands, for he but received them in the capacity of messenger, merely, for the specific purpose of conveying them to the parties entitled to receive them from Craig: *Otis v. Spencer*, 102 Ill. 622, 40 Am. Rep. 617.

But it is urged acceptance of the conveyance by the appellant was essential to the full and complete transfer of the title by the deed. It did not appear the appellant knew of the execution of the deed until after the marriage of his father and the appellee. It was, however, proven the deceased and his former wife had determined upon the division among their children of the portion of his land conveyed by the five deeds, and had ~~and~~ decided to give to each of them the parcels as finally con-

veyed by those deeds; that one of his daughters was not well satisfied with the parcel the father and mother selected for her, but appellant was at that time advised of the purpose of the father to convey the parcel to him and was satisfied and ready to accept it. The consummation of the purpose of the parents was, however, delayed, because of the dissatisfaction of his daughter, until after the death of the mother, which occurred two years prior to the marriage of the father and the appellee. On the eve of his second marriage the father concluded to settle the land upon his children in accordance with the previous intention formed by himself and his deceased wife, and consummated that purpose by executing the deeds, as before stated, and delivering them to Craig with instructions to deliver them to one of the grantees, the appellant, whom, it would seem, the father had selected to receive the conveyances for all the grantees. The appellant was, as the father well knew, willing to accept the deed. Appellant was not, however, advised of the execution of the deed until after the marriage of appellee to his father. When advised he accepted the conveyance. Under the circumstances of the case, the acceptance would relate back to the time of the delivery of the deed by the grantor to Craig, unless the rights of others had in the meantime intervened.

The contention is, that by the solemnization of the marriage the inchoate right of the appellee to dower in the lands of her husband arose and attached; that the deed was in fraud of that right, and not having been actually delivered until after the marriage, should be deemed and treated as a conveyance of the interest of the husband alone, the right of the wife, the appellee, being in nowise affected by it. It seems to us very clear the conveyances in question were not in fraud of the rights of the appellee. They were made in pursuance of a purpose settled upon by the grantor and his former ⁴⁵³ wife, and not with actual design of perpetrating a wrong upon the intended second wife. It appeared from the testimony of the appellee herself that her husband, on the day preceding their marriage, told her he was going to make some deeds, and they stopped at his home on the way to Mattoon and got some papers to be used in the preparation of the deeds, and while the appellee did not expressly admit she knew what of his land her intended husband proposed to convey, it is entirely clear there was no desire to deceive her or deprive her of the fullest information as to what the husband was about to do, and we have no doubt, from the testimony of the appellee, she was informed fully as to the con-

veyances the husband intended to make. After she had testified that when they were on the way to Mattoon, on the day preceding the marriage, they stopped at his house and got some papers, and he told her he was going to take the papers to Mr. Craig's office while they were in Mattoon, for the purpose of having some deeds made, she was asked, "Didn't he tell you what property he was going to deed?" and she answered, "I am not sure." The conclusion which, in our view, should be drawn from this testimony is, she was sufficiently advised of what her intended husband was arranging to do and was content therewith. Moreover, it is not apparent she was injured or deprived of any of her just rights by the execution of the deeds. The husband was the owner of two hundred and twenty-five acres of land. Had he retained the ownership of the entire body until the time of his death, the appellee, being his widow, would have been endowed of an undivided one-third interest thereof and entitled to an estate of homestead therein. She admitted, while upon the witness stand, that after the marriage her husband conveyed to her an eighty-acre tract of the land, which included the home place, for and during her natural life, and that she accepted such conveyance. Her dower rights and right of homestead would have been beneficial to her only ⁴⁵⁴ for and during her natural life, and it is not contended or apparent that an assignment of dower and homestead in the entire body of the land would have been more beneficial or desirable than the interest vested in her by the voluntary conveyance of the husband, which she voluntarily accepted with full knowledge of the manner in which he had settled the other portions of his land upon the appellant and his other children and grandchildren.

The court should not, under all the circumstances of the case, have sustained appellee's claim to dower in appellant's land, but should have dismissed her petition.

The decree is reversed and the case will not be remanded.

IN THE SUBSEQUENT CASE of Mann v. Jummel, 183 Ill. 523, it was decided that a recorded deed releasing a trust deed was valid, although there was no manual delivery of the deed to the trustee, in a case where the grantee agreed with the grantor to have the deed executed and recorded, and, in compliance with his agreement, paid the expense of having it done.

DEEDS—DELIVERY TO THIRD PERSON.—A deed delivered to the husband of the grantee, with an intention on the part of the grantor that title should pass, vests the title in the grantee, though the deed was made without her knowledge, and was not delivered

to her by her husband but came to her possession some months afterward: See extended note to *Brown v. Westerfield*, 53 Am. St. Rep. 540. The acceptance of a deed, delivered to a stranger for the use and benefit of the grantee, makes it operative from the time of delivery, even though he is ignorant of its existence, provided the rights of creditors have not intervened: Note to *Brown v. Westerfield*, 53 Am. St. Rep. 552, 553.

DOWER—ANTENUPTIAL CONVEYANCE.—If lands are sold by an unmarried man, his subsequent marriage does not create any right to dower therein, though they are not conveyed to the purchaser till after the marriage: *Chapman v. Chapman*, 92 Va. 537, 53 Am. St. Rep. 823. On transfers by husbands in fraud of wives, see the extended note to *Thayer v. Thayer*, 39 Am. Dec. 218-220.

METROPOLITAN WEST SIDE ELEVATED RAILROAD COMPANY v. SKOLA.

[188 ILLINOIS, 464.]

MASTER AND SERVANT—VICE-PRINCIPAL—FELLOW-SERVANTS.—If a railway foreman, in his capacity of vice-principal, determines to run cars on a repair track after ordering a car repairer to work under a car already on such track, and negligently fails to warn such car repairer of his determination and of the resulting danger, his act is that of the master, and the fact that the foreman acts as motorman in running the cars upon the repair track does not relieve the master from liability. In such case, the foreman and the car repairer are not fellow-servants.

TRIAL—INSTRUCTIONS.—A refusal to give proper instructions as to the duty of the jury in arriving at a verdict is not ground for reversal of the judgment, if the evidence clearly warrants the verdict, and the instructions given fully state proper rules for the guidance of the jury.

J. A. Post and O. W. Dynes, for the appellant.

B. F. Richolson, R. Frankenstein, and C. S. Beattie, for the appellee.

⁴⁵⁵ **BOGGS, J.** The defendant in error, administrator, in an action on the case under the statute, recovered a judgment in the superior court of Cook county in the sum of eighteen hundred dollars against the plaintiff in error for damages sustained by reason of the death of his intestate through alleged actionable negligence on the part of the servants of plaintiff in error. This is a writ of error to bring into review a judgment of the appellate court affirming that of the superior court.

The refusal of the superior court to direct a verdict for the plaintiff in error is the first assigned error.

The plaintiff in error operated an elevated electric railway in the city of Chicago. It maintained a track on which cars which needed to be repaired, cleaned, or inspected were temporarily stored while such work was being performed. The work of cleaning, repairing, and inspecting the cars was performed by a force of workmen under the control of a foreman, one Fred McCrumb. Joseph Triska, the intestate of the defendant in error administrator, was employed as one of the force, and, together with one Frank Pitman, served as inspector ⁴⁵⁶ of the brake-rods, air-pumps and valves of the cars. Other members of the force were engaged in the work of repairing, and still others in cleaning the cars, but all worked together and sometimes interchanging in their duties. The cars were brought to this cleaning, repairing, and inspecting track from the main track by one George Barron, but it seems the foreman, McCrumb, would at times bring down the cars instead of Barron. On the occasion in question, McCrumb, the foreman, directed the deceased and another workman of the force to go underneath the cars and wipe the motors. In obedience to such orders, the deceased went underneath car No. 704 and engaged in the work of cleaning the motor of that car. While so engaged, McCrumb, the foreman, went east to a point on the main track where there were cars that needed to be cleaned, repaired, and inspected, and proceeded to put them in motion to bring them down to the track on which stood the car under which the deceased was working. McCrumb acted as motor-man, and his testimony is to the effect he exercised ordinary care in endeavoring to control them. The cars, however, moved at a high rate of speed in upon the cleaning, inspecting, and repairing track, and collided with great force and violence with car No. 704, under which the deceased was working, and drove the wheels of the car upon and over the body of the deceased and fatally injured him.

The right to recover was based upon two alleged grounds of negligence: 1. That the cars were negligently and recklessly driven and propelled by McCrumb; and 2. That no warning or notice was given of the approach of the car.

The theory upon which counsel for the plaintiff in error insist the court should have directed a verdict in its favor is, that it appeared from undisputed facts that McCrumb, though when acting in his capacity as foreman was a vice-principal of the common employer, was, when ⁴⁵⁷ engaged in bringing cars in upon the cleaning, inspecting, and repairing track, but perform-

ing the duties of a common laborer and was then directly co-operating with the deceased in the particular business of the employer and in the same line of employment, and that McCrumb had frequently before brought cars in and upon the said cleaning and repairing track, and that his employment, while so engaged in so bringing the cars to the place where they were to be inspected, cleaned, and repaired, and the duties of the deceased as an inspector, cleaner, and repairer of such cars, brought them into habitual association so they could and should have exercised a mutual influence upon each other promotive of proper caution. The contention, therefore, is, the court should have declared, as matter of law arising out of undisputed facts, that the relation of fellow-servant existed between the deceased and said McCrumb, and that the doctrine of respondeat superior did not apply. But the question as to what cars should be brought from the main track in and upon this cleaning, inspecting, and repairing track, and when such cars should be so brought in, and where cars so coming in should be placed thereon, was to be determined by McCrumb in the exercise of the duties devolving upon him in his capacity as vice-principal. Whether if, after he had directed the deceased to engage in work beneath a car standing on the cleaning, inspecting, and repairing track, ordinary care and due regard for the safety of the deceased required that the foreman, before putting into execution his determination to move other cars upon the same track, should have in some way notified or warned the deceased of what he, as foreman, had determined and was about to do, was a question of fact for the jury. If it was negligence to cause cars to be put in motion on the track where other cars stood under which workmen were engaged in their duties, without first warning the workmen who would be endangered by such course, then the negligence was that of the master, ⁴³⁸ acting through the foreman as the representative of the master: *Pittsburg Bridge Co. v. Walker*, 170 Ill. 550.

Objections urged against the action of the court in ruling on the instructions to the jury were well considered by the appellate court, and the following excerpt from the opinion of that court, delivered by Mr. Justice Sears, is adopted as the opinion of this court, viz.:

"The first of the refused instructions told the jury, in effect, that if McCrumb could not, in the exercise of ordinary care, stop the motor-car in time to avoid the injury, then the plaintiff could not recover. It was properly refused, for it ignored

the question of whether, in the exercise of ordinary care, the train should have been sent upon the track at all without warning to Triska. The refusal to give the second was not error, for it was sufficiently covered by the nineteenth instruction given. The third refused instruction was substantially included in the twenty-second instruction given. The seventh was covered by two instructions given, viz., the fourteenth and the eighteenth.

"Each of the sixth and eighth refused instructions presents correct propositions, and such as should, at the request of either party, be given to the jury. We are of opinion that the trial court should in this case have given them as requested. In substance, they inform the jury that they should not arrive at their verdict through considerations other than of the evidence and the law; that they should not allow prejudice or sympathy to influence their action in this behalf, and that they should not reach a verdict by chance. But while the court should, we think, have given these instructions, yet it does not follow that the refusal should work a reversal. For two reasons we are disposed to disregard the error in refusing to give those instructions: 1. Because we are of opinion that the evidence clearly warrants the verdict which was returned; and 2. Because of the number of other instructions submitted to the court and given. ⁴⁵⁹ Fifty-four instructions were tendered to the court, of which forty-five were instructions offered by the defendant, plaintiff in error here. The court gave twenty-six of these instructions to the jury, seventeen of those given being instructions which were tendered by the plaintiff in error. In the course of these twenty-six instructions the jury were very thoroughly informed as to just what should guide them in arriving at their verdict. In the nineteenth instruction given they were directed to disregard any theory or argument as to anything not covered by the specific charges of the declaration, and that they should not consider any ground of recovery other than the specific charges of the declaration. We are of opinion that in view of all these instructions which were given it may be safely concluded that no prejudice to plaintiff in error resulted from the refusal to give the two instructions indicated."

The judgment of the appellate court is affirmed.

MASTER AND SERVANT—VICE-PRINCIPALS.—A car repairer is not a fellow-servant with a foreman of car repairers, and their employer is liable for an injury to such car repairer received

through the negligence of such foreman while engaged in extra-hazardous employment under his order and promise of protection: *Missouri Pac. Ry. Co. v. Williams*, 75 Tex. 4, 16 Am. St. Rep. 867. But a gang boss is not a vice-principal, and if he suggests that a servant go underneath a car for a certain article, and injury results from his negligence in making the suggestion, it is the negligence of a fellow-servant: *Keenan v. New York etc. R. R. Co.*, 145 N. Y. 190, 45 Am. St. Rep. 604. See, on vice-principals in general, the monographic note to *Mast v. Kern*, post, p. 580.

INSTRUCTIONS.—If the result reached by the trial is correct, errors in giving or denying instructions must be treated as harmless on appeal: *Fox v. Windes*, 127 Mo. 502, 48 Am. St. Rep. 648.

HUDNALL v. HAM.

[183 ILLINOIS, 486.]

WILLS—REVOCATION OF BY MARRIAGE—ANTENUPTIAL CONTRACT—IGNORANCE OF LAW AS AFFECTING.—Ignorance by the parties to an antenuptial contract of the law that marriage operates as a revocation of a prior will does not invalidate the contract, nor annul the settlement thereunder.

WILLS—REVOCATION OF BY MARRIAGE—ANTENUPTIAL CONTRACT.—A marriage operates, per se, as a revocation of a prior will, although an antenuptial contract was entered into expressly for the purpose of confirming the disposition of the property as made by the will.

ILLEGITIMATE CHILDREN—INHERITANCE BY AND FROM.—The right of an illegitimate child to inherit property, and of legitimates to inherit from him, is entirely dependent upon statute, and cannot exist in any case which does not come within the statute.

ILLEGITIMATE CHILDREN—COLLATERALS.—A statute providing that the estate, real and personal, of an illegitimate child shall descend to and vest in the widow or surviving husband and children confers no right upon collateral heirs, and the children of the mother of an illegitimate child can claim under such statute only when there is no widow.

INHERITANCE—ASSIGNMENT OF CONTINGENT INTERESTS.—Contingent interests and expectancies, and things having no present existence, but which rest only in possibility, may, by contract, bona fide made and for a sufficient consideration, be assigned so as to be binding in equity.

ASSIGNMENT OF CONTINGENT INTEREST BY ANTENUPTIAL CONTRACT AND REVOKED WILL.—A valid antenuptial contract made to confirm the husband's will, subsequently revoked as his will, by his marriage, operates as an equitable assignment of the property in accordance with the terms of the will, when fairly entered into and expressly sanctioned by the wife, who subsequently becomes the sole heir of the husband.

DOWER.—WHETHER AN ANTENUPTIAL CONTRACT is sufficient to bar or release the widow's dower is immaterial, if she is sole heir and no question of homestead is involved.

Blood & Blood, Sims & Covington, and J. A. Watta, for the appellants.

G. W. Wall and C. H. Patton, for the appellees.

⁴²⁹⁴ CARTER, J. Upon the final hearing, where the greater part of the testimony of the witnesses was heard in open court, the chancellor rendered the decree appealed from, finding the issues in favor of the Hams, and dismissing both the amended bill and the cross-bill. From this decree the Hudnalls and the widow have taken separate appeals, but these appeals have been considered together and will be disposed of here as one case.

⁴²⁹⁵ The cross-bill was not before us when the case was here on error (*Hudnall v. Ham*, 172 Ill. 76), and it was there said that the rights of the widow under her cross-bill were not affected by that decision, except that, as the bill alleged, the antenuptial contract having been fully performed by her acceptance of and receipt for the money under it, the burden rested upon her to show, if she could, any sufficient grounds upon which it could be set aside. We have carefully considered all of the evidence, and cannot avoid the conclusion, reached also by the court below, that she has not sustained this burden, but has failed to establish the allegations of her cross-bill that she was deceived by Jeremiah Taylor as to the extent and value of his property and as to the facts upon which her right to inherit his property would depend, or that the same were concealed from her. We cannot find from the evidence that the contract was not fairly entered into or not fairly carried out. It is clearly shown that she approved and joined in Taylor's desire that the bulk of his property should go to his said two stepsons, whom, as she knew, he had brought up from boyhood in his family with the same affectionate care as if they had been his own children, and who had aided him in the acquisition of his property. While it is doubtless true that she accepted and receipted for the two thousand dollars in ignorance of the law that her marriage with Taylor revoked the will which he had made in favor of the Hams, still no deception was practiced upon her, and the Hams seemed to know no more of that subject than she, and evidently Taylor died in the belief that his property would pass in accordance with his will and the antenuptial contract. Such was the intention of both parties to this contract, shown both by the contract itself and the circumstances under which it was entered into. Her mere ignorance

of the law cannot be availed of by her to overturn the settlement.

Counsel for appellees make the contention, and cite authorities to support it, that the marriage was only a ⁴⁹⁶ presumptive revocation of the will, and that that presumption was in this case rebutted by the antenuptial agreement. But in effect the decision of this court when the case was here before on demurrer to the bill was, that the will was revoked by the subsequent marriage notwithstanding the antenuptial agreement. The question has been settled, at all events, by this court in *McAnnulty v. McAnnulty*, 120 Ill. 26, 60 Am. Rep. 552, where it was held that under the provision of the statute that "a marriage shall be deemed a revocation of a prior will," a marriage operates *per se* as such revocation. It follows, therefore, that Taylor's will was revoked by his subsequent marriage, and that the devisees and legatees therein named cannot take the property under that instrument as a will. Nor can they take it at all unless the antenuptial agreement and the instrument executed as a will, when taken and construed together, constitute an equitable assignment of the property to them which a court of equity will enforce to carry the contract into effect in accordance with the intention of the parties to it. It follows, also, that the widow is barred by the antenuptial contract and its full performance unless the inheritance is cast upon her as the sole heir, for the reason that, as a matter of law, it can go nowhere else. Section 2 of chapter 39 of the Revised Statutes, in regard to descent, after providing that an illegitimate child shall inherit from its maternal ancestor, etc., provides: "2. The estate, real and personal, of an illegitimate person, shall descend to and vest in the widow or surviving husband and children, as the estate of other persons in like cases; 3. In case of the death of an illegitimate intestate leaving no child or descendant of a child, the whole estate, personal and real, shall descend to and absolutely vest in the widow or surviving husband; 4. When there is no widow or surviving husband, and no child or descendants of a child, the estate of such person shall descend to and vest in the mother and her children, and their descendants—one-half to the ⁴⁹⁷ mother, and the other half to be equally divided between her children and their descendants, the descendants of a child taking the share of their deceased parent or ancestor; 5. In case there is no heir as above provided, the estate of such person shall descend to and vest in the next of kin to the mother of such intestate, according

to the rule of the civil law; 6. When there are no heirs or kindred, the estate of such person shall escheat to the state, and not otherwise."

It is clear from the evidence that Taylor was the illegitimate son of Sallie Taylor, who, by her subsequent marriage, became the maternal ancestor of the appellants, the Hudnalls, and that if Taylor had left no widow they would have been his heirs at law, his mother, Sallie Taylor, having previously died, and he never having had any child. The grounds, then, upon which the respective parties claim the property in controversy are reduced to these: The Hudnalls claim as Taylor's heirs at law under the statute; the Hams claim as equitable assignees under the antenuptial agreement, coupled with the instrument which, as a will, was revoked by Taylor's marriage; the widow claims that Taylor left no heir at law but herself, and that, being the sole heir, under the statute she is entitled to the property, notwithstanding her agreement. The Hudnalls, by their bill, are the moving parties in the controversy, and their contention will be considered first.

At common law an illegitimate had no inheritable blood—could neither inherit nor transmit by inheritance save to those of his own body. The right of an illegitimate to inherit property, and the right of others, though legitimate, to inherit from him through the maternal line, are conferred by the statute, and can have no existence in any case which does not come within the statute. The second paragraph, that "the estate, real and personal, of an illegitimate person, shall descend to and vest in the widow or surviving husband and children, as the estate ^{also} of other persons in like cases," has nothing to do with the case at bar, as mistakenly supposed by appellants, the Hudnalls. It confers no rights whatever upon collaterals. It simply gives to the surviving husband or wife and children of an illegitimate the same rights of inheritance from the deceased parent that they would have had if he or she had been legitimate. And by the third paragraph the widow, Mary E. T. Taylor, is made the sole heir of her deceased husband. Counsel for Hudnalls claim under the fourth paragraph of the statute. Had Mary E. T. Taylor died first, or had there been no widow, it is plain they could inherit under this clause, as they were children and descendants of deceased children of Sallie Taylor, the mother of Jeremiah Taylor. But the difficulty with their position is, that the statute would make them heirs only in case Taylor left no widow, and he did leave a widow. It

is immaterial whether the widow has assigned or has barred or estopped herself from taking or not, as their right to inherit does not, under the statute, depend on any act or contract of hers, but, so to speak, on her nonexistence at Taylor's death. They cannot take under the statute and against the statute at the same time. They are not his heirs at law at all, because he left surviving him a widow. If we were at liberty to interpolate words in the statute and make it read, "When there is no widow who has not released or who is not barred or estopped by contract the estate shall descend," etc., the Hudnalls could be declared the heirs; but we have no authority to add to or qualify the statute or to pervert its plain meaning. Mary E. T. Taylor is no less the widow of Jeremiah Taylor because she executed the antenuptial agreement. She was his lawful wife and upon his death became his lawful widow, and her antenuptial contract cannot be used to confer heirship upon these appellants where none is conferred by law. Heirship is not created by contract, but by law only. Persons who inherit are heirs at law—not heirs by contract.

It is insisted by counsel for the Hudnalls that their contention is supported by *Crum v. Sawyer*, 132 Ill. 443—that is, that the antenuptial agreement had the same effect to make them the heirs as would the death of the widow before the death of her husband. But in this they are in error. What was there said was in reference to the antenuptial contract on the rights of the surviving husband and other heirs where there were other heirs at law of the wife, he being only one of such heirs. It was not held or intimated that the effect of the contract was to make persons heirs at law who were not so by law, but only to enlarge the portions which the other heirs would take. And such, of course, would be the necessary effect, for the release of one heir to the estate would operate to increase the shares of the rest without at all changing the legal status of heirship.

Again, it is difficult to see upon what principle of equity a court of equity could proceed to grant the relief prayed for. To give the antenuptial agreement the effect contended for would violate equities of the strongest character, and would be to enforce only a part of the contract—just enough of it to dispossess of the widow out of the way of the other appellants, and then, ignoring the rest of it, to violate the clearly expressed intention of the contracting parties by disposing of the property in utter disregard of the sole purpose for which the contract was made. It is to be noted that the Hudnalls rely upon this

contract, for without it they concede that the widow would be the sole heir and they would have no rights as heirs or otherwise. The contract, however, shows on its face that it was not made for their benefit but for the benefit of others—that is, to dispose of the property at Taylor's death to the persons as named in his will. The Hudnalls assume the same position toward the contract as toward the statute—that is, while claiming by virtue of it, they at the same time claim against its provisions. This they cannot be permitted to do. They cannot avail ⁵⁰⁰ themselves of so much of the contract as is favorable to them and disregard or override that which is against them. The contract should be enforced altogether, if at all, and not partially (2 Story's Equity Jurisprudence, 986, 1077, and notes), and so as to carry into effect the intention of the contracting parties, and not to thwart that intention.

It clearly appearing, then, that the Hudnalls are not entitled to the property, the question remains whether the widow, as sole heir of her deceased husband, is entitled to it, or whether there was an equitable assignment of it to the Hams. It is plain that it did not escheat, for the sixth paragraph of the statute provides that, "when there are no heirs or kindred, the estate of such person shall escheat to the state, and not otherwise." Clearly, then, unless the antenuptial contract, in connection with the instrument revoked, as a will, by operation of law, constitutes an equitable assignment to the Hams—the persons named as beneficiaries in the so-called will—the widow is entitled to the property as the sole heir, for if the contract does not have this effect it cannot, under the facts in this case, have any effect whatever. As a mere release or relinquishment for the benefit of the heirs of the deceased, there being no heir but herself, the instrument could have no more effect than one made for her own benefit. But we are of the opinion that the contract has all the effect of an equitable assignment of all her interest in the property to the intended beneficiaries, as expressed in the instrument executed by Taylor for his last will. It is too well settled to require discussion that contingent interests and expectancies, and things having no present existence but which rest only in possibility, may, by contract bona fide made and for a sufficient consideration, be assigned so as to be binding in equity. Such a contract will be enforced in equity after the subject matter of it has come into existence: *Crum v. Sawyer*, 132 Ill. 443; 2 Am. & Eng. Ency. of Law, 2d ed., 1029, and notes. Thus it was said by this court in *Crum* ⁵⁰¹ v. Sawyer,

132 Ill. 461: "This court has repeatedly held that estates in expectancy, though contingent, are proper subjects of contract, and, therefore, that assignments by expectant heirs of their future contingent estates, when made fairly and upon valuable considerations, though inoperative at law, will be enforced in equity as executory agreements to convey": *Ridgeway v. Underwood*, 67 Ill. 419. It is also well settled that it is competent for persons owning property or interests therein to make a contract to dispose of it, by will or otherwise, in a certain way, and that such a contract, based upon a sufficient consideration, will be enforced in equity: *Whiton v. Whiton*, 179 Ill. 32; *Barrett v. Geisinger*, 179 Ill. 240. It is also true that several instruments may be taken and construed together as constituting one entire contract: *Freer v. Lake*, 115 Ill. 662; *Wilson v. Roota*, 119 Ill. 379.

Taylor had been appointed the legal guardian of his stepsons when they were infants and had received certain moneys belonging to them, and there was no record or other evidence whether or not he had ever accounted for or paid the same, but the evidence is undisputed that he stood in loco parentis to them from his marriage to their mother, and after they grew to manhood still regarded them as his sons, and until his death cherished the lifelong purpose of making them the beneficiaries of all of his property. To accomplish this purpose he made the will in question, and the contract with his second wife before his marriage. The record shows that she was fully informed of substantially all of these facts and was willing to assist him in carrying out his long-cherished purpose. Under these circumstances the antenuptial agreement was made, which, in addition to the usual provisions of release and relinquishment in such instruments, contained this provision: "Said party of the second part hereby declares that she has been informed of the execution of a will by the party of the first part, by the terms of which his entire estate, whether in possession ⁵⁰² or expectancy, has been devised and bequeathed to persons other than herself; and she further declares that such disposition of the property of the first party meets with her approval, and will not be interfered with by her in any way, either during the lifetime of the party of the first part or thereafter." It appears, also, that the will in question was the will referred to, and that after Taylor's death and the probate of the will she received from O. M. D. Ham, the executor, the two thousand dollars, and gave her receipt for the same, which receipt stated, among other

things, that it was given for "the amount due me by the terms of the antenuptial agreement between the undersigned and said Jeremiah Taylor, deceased, and in full of all claims against said estate, either under said last will and testament or said antenuptial agreement, or otherwise." The receipt also recited that she had received certain other articles of personal property which had been given to her by Taylor in his lifetime.

It seems too clear for argument upon the facts and circumstances under which the will and antenuptial agreement were made, and from the reference to the will in the agreement and her covenant not to interfere with its provisions, that the written instrument intended as a will became a part of the whole agreement between the parties, notwithstanding the operation of the statute revoking the instrument as a will. It was still an intelligible written declaration of Taylor's wishes and intentions that the property should go to the Hams at his death, and though inoperative as a will, the written contract signed by him, and by the widow, who was his sole heir, made it operative as a part of their contract. Her contract of approval was a contract of confirmation, and her covenant not to interfere in any way with the disposition of the property thus made is binding upon her, especially in view of her ratification and full performance of the contract after Taylor's death. Construing the instrument intended as a will and the antenuptial ⁵⁰³ agreement as one entire contract, its effect was a binding agreement between the only two parties having any interest in the property, either in possession or expectancy, that upon Taylor's death the whole title of the property should vest in the Hams, as provided in the instrument called a will.

While no case precisely in point has been cited by counsel on either side, we are referred to many cases which announced and applied equitable principles to carry out the intention of the parties, which are equally applicable here. Thus, in *Lant's Appeal*, 95 Pa. St. 279, 40 Am. Rep. 646, on the eve of marriage the man and woman agreed verbally that she should dispose of her property, which was of large value, as she pleased, whereupon she made a will giving a liberal portion to her intended husband and the rest to relatives and charities, and thereupon they were married. Two years thereafter she died. The husband contested the will and claimed the entire estate, but it was held that while the will was revoked, under the statute, by the marriage, it would, in connection with the verbal agreement, be enforced in equity as an antenuptial contract,

and that the husband was estopped from interfering with its full enforcement: See, also, *Bradish v. Gibbs*, 3 Johns. Ch. 532; 1 Ld. Raym. 290; 2 P. Wms. 209; also *Neves v. Scott*, 9 How. 196, 13 How. 268, where an antenuptial agreement was enforced which provided that the property of each of the contracting parties should be held in common after their marriage during their joint lives, and by the survivor during his or her life, and then should be equally divided among the heirs of the man on the one hand and of the woman on the other. There were no direct heirs, and evidently none were contemplated by the contracting parties, and it was held that their collateral heirs could enforce the contract; that they were not volunteers, but came fairly within the influence of the considerations upon which the agreement of the parties was founded, and were the special objects of their ⁵⁰⁴ bounty. It was said by the court in that case that "courts will endeavor, as much as possible, to give effect to marriage agreements according to the understanding of the parties." There would seem to be no serious difficulty in the case at bar in carrying into effect the marriage settlement under consideration.

Nor do we regard the suggestion of counsel, even if it be correct, that Taylor was not deprived, by the antenuptial agreement, of the power to change his will, but that it remained ambulatory till his death and might have been changed altogether, as fatal to the contentions of the Hams. As a matter of fact, he did not modify or change it. The antenuptial agreement would not have been invalid if it had in express terms reserved to Taylor the power to make a different disposition of his property freed from all claims of the widow.

It is further suggested that the contract was not sufficient to bar or release the widow's dower. She was the sole heir, and there was no separate dower interest, and no question of homestead is involved in the case.

It is next said that as the Hams filed no cross-bill they can have no relief. It is sufficient to say that the decree appealed from granted them no affirmative relief, but simply found the issues in their favor and dismissed the bill of the Hudnalls and the cross-bill of the widow, which attacked their right to and possession of the property. The Hudnalls had no right to it whatever, and the widow had disposed of her right to it by contract, and had estopped herself from interfering in any way with the Hams in the assertion of their claims.

The decree is right from every standpoint, and it will be affirmed.

Phillips and Magruder, JJ., and Cartwright, C. J., dissenting.

WILLS, REVOCATION OF.—THE MARRIAGE of a man did not by the common law revoke a previous will: *Hulett v. Carey*, 66 Minn. 327, 61 Am. St. Rep. 419; and this is the rule in the United States unless expressly abrogated by statute: See extended note to *Graham v. Burch*, 28 Am. St. Rep. 359; but under such a statute a will is absolutely revoked as to all persons by marriage: *McAnnulty v. McAnnulty*, 120 Ill. 26, 60 Am. Rep. 552.

WILLS, REVOCATION OF.—ANTENUPTIAL CONTRACT.—Under a statute declaring that the will of a man or woman shall be revoked by his or her marriage, a will made by a woman three days before her marriage, with the consent of her intended husband, who, by antenuptial contract entered into on the day of the marriage, relinquished all interest in her estate, is not revoked by the marriage: See monographic note to *Graham v. Burch*, 28 Am. St. Rep. 359.

DESCENT—RIGHTS OF BASTARD.—A bastard, made capable by statute of inheriting or of transmitting an inheritance on the part of his mother as if lawfully begotten, is not thereby rendered capable of taking by inheritance from collateral kindred on his mother's side: *Williams v. Kimball*, 35 Fla. 49, 48 Am. St. Rep. 238. See the extended note to *In re Ingram*, 12 Am. St. Rep. 101-103, discussing the right of illegitimate children to inherit and transmit property.

EXPECTANCIES—ASSIGNMENT.—In equity, agreements for the sale or release of expectancies, if fairly made and for an adequate consideration, are enforceable: *In re Garcelon*, 104 Cal. 570, 43 Am. St. Rep. 134. See the monographic note to *McCall v. Hampton*, 56 Am. St. Rep. 339-361, on the assignment of expectancies.

SINGER v. HUTCHINSON.

[133 ILLINOIS, 606.]

JUDGMENTS—CONCLUSIVENESS.—A judgment rendered in a court of competent jurisdiction is conclusive between the parties and privies in regard to all matters in controversy determined by the judgment, and all persons represented by the parties, both plaintiff and defendant, are bound and concluded as privies by the judgment rendered.

CORPORATIONS REPRESENT THEIR STOCKHOLDERS in all matters within the scope of their corporate powers transacted in good faith by the officers of the corporation.

CORPORATIONS REPRESENT THEIR STOCKHOLDERS in bringing and defending suits respecting the rights and obligations of the corporation.

CORPORATIONS—JUDGMENT AGAINST—CONCLUSIVENESS OF—CREDITOR'S BILL.—In the absence of fraud or want of jurisdiction, a judgment on the merits against a corporation by

a creditor is conclusive of the amount of his claim, as against stockholders made defendants to a creditor's bill to reach corporate assets in the hands of such stockholders.

CORPORATIONS—STATUTE EXTENDING LIFE OF—CONSTRUCTION.—A statute providing that corporations, whose charters may have expired, shall continue their corporate capacity for two years for the purposes of collecting debts and selling their property, applies to corporations created after its passage as well as to those then existing.

CORPORATIONS—CREDITORS' BILLS AGAINST—PARTIES.—A judgment creditor of a corporation, in proceeding by creditor's bill to reach assets of the corporation in the hands of its stockholders, need not make all of such stockholders parties.

CORPORATIONS—ASSETS AS TRUST FUND.—The capital stock and property of a corporation is a trust fund for the payment of its debts, and the assets of the corporation in the hands of its stockholders are the property of the corporation, and subject to the claims of its creditors.

CORPORATIONS—CREDITORS' BILLS AGAINST—CROSS-BILL—PARTIES.—Upon filing a creditor's bill against part of the stockholders in a corporation to reach corporate assets in their hands, the defendants, if they desire an equitable distribution of the burden among all of the stockholders, should file a cross-bill, or may file an original bill in an independent action, and the fact that all of the stockholders were originally joined in the creditor's bill does not excuse the filing of such cross-bill, if the bill was subsequently dismissed as to part of them.

I. W. & C. C. Buell and A. B. Jenks, for the appellants.

Barnum, Mott & Barnum and T. A. Moran, for the appellees.

⁶¹² **CRAIG, J.** It is first claimed by appellants in the argument that the judgment recovered in the law court against the stone company is not proper evidence of the existence of a claim against the corporation to charge property in good faith distributed to appellants, they not being parties thereto. It is a well-settled rule that a judgment rendered in a court of competent jurisdiction is conclusive between parties and privies in regard to all matters of controversy determined by the judgment, and all persons represented by the parties, both plaintiff and defendant, are bound and concluded as privies by the judgment which may be rendered. It is also a well-settled rule that a corporation represents the stockholders in all matters ⁶¹³ within the scope of its corporate powers transacted in good faith by the officers of the corporation. Among the conceded powers of corporations may be mentioned those of bringing and defending actions in regard to the rights and obligations of the corporation. *Bissit v. Kentucky River Nav. Co.*, 15 Fed. Rep. 353, is an interesting case on this question, where the authorities are fully cited and commented upon in a note.

This was a creditor's bill by a creditor who had reduced his claim to judgment against the Singer & Talcott Stone Company, brought against the corporation and its stockholders, to reach assets belonging to the corporation which had been turned over by the officers of the corporation to the stockholders in fraud of the rights of creditors, and it is not claimed that the judgment against the corporation was obtained by fraud, or that there was a want of jurisdiction in the court in which the judgment was rendered. In the absence of fraud in obtaining the judgment against the corporation, and in the absence of a want of jurisdiction in the court wherein the judgment was rendered, we think the judgment in a case of this character was conclusive against the stockholders as to the amount and validity of the claim of the creditor.

Three other grounds are relied upon to reverse the judgment of the appellate court: 1. That the finding of the court, in the decree, that the stone company employed appellees before the expiration of its charter and while it had power so to do is not supported by any evidence in the case; 2. That none of the living solvent stockholders who were parties defendant should have been dismissed out of court, but the decree (if appellees had been entitled to any) should have been that such stockholders pay the claim by a pro rata contribution; and 3. That the appellants offered, by cross-examination of Post and by questions put to their own witnesses and by tender of evidence for the defense, to show that the appellees' claim did not arise at the time ⁶¹⁴ Post testified that it did, that that claim was without merit, and that appellees never had any claim against the corporation. These questions were fully discussed by Mr. Justice Adams of the appellate court in the following opinion, in which we concur:

"The court, in its decree, found as follows in respect to the claim of appellees, which was the foundation of their judgment against the Singer & Talcott Stone Company: 'Said claim so reduced to judgment, and the liability of said company, were legitimately incurred by said company, in the exercise of said company's corporate capacity and power, in and about the selling and disposing of its corporate property, and was so incurred by the employment by the Singer & Talcott Stone Company of the complainants herein on or about January 10, 1892, as real estate brokers, to procure for said company a purchaser for its said above-described real estate,' etc.

"The Singer & Talcott Stone Company was organized under 'An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes,' approved and in force February 18, 1857. The company was organized April 20, 1872, and the term of its corporate existence was fixed by its articles of association, and the license issued in pursuance thereof, at twenty years, viz., until April 20, 1892. The specific objection to the above finding of the court is, that, excluding the evidence of Post, there is no evidence to justify the finding that appellees were employed by the Singer & Talcott Company prior to April 20, 1892. The pleadings in the lawsuit in which the judgment against the Singer & Talcott Stone Company was recovered by appellees, consisting of a declaration and a plea of the general issue, were put in evidence by appellees. The declaration contains a special count, in which is averred the employment of appellees by the company to procure for the company a purchaser of certain described real estate owned by it, at ten dollars per square foot or at such price ^{as} as would be satisfactory to the company—appellees, for procuring such purchaser, to receive two and one-half per cent of the price paid—and that appellees did procure such purchaser at a price satisfactory to the company, etc.

"The company was sued and declared against by the name 'Singer & Talcott Stone Company, a corporation,' and filed a plea of the general issue in that name, supported by an affidavit of merits by Edward T. Singer, in which affidavit the affiant states that he is the president of the Singer & Talcott Stone Company. The record of the judgment shows that the company, by its attorney, moved for a new trial and in arrest of judgment, and argued those motions, from all of which it appears that the cause was tried and judgment rendered on the merits. The judgment so rendered is conclusive that all matters essential to a recovery were proved. The action was assumpsit, and it was necessary to appear that the defendant, the Singer & Talcott Stone Company, had made a contract with the plaintiffs which it had the corporate capacity to make. It was, under the pleadings, clearly competent for the stone company to show, if such was the case, that the contract under which the plaintiffs claimed was not within the corporate power of the company; that it was ultra vires, and, therefore, that in legal contemplation there was no contract. A judgment is conclusive as to all defenses provable under the issues: 2 Black on Judgments, sec. 609.

"The judgment being conclusive as against the company, and, therefore, against the appellants, that the company had the corporate capacity to make the contract on which the judgment was based, then if the company had not such corporate capacity after April 20, 1892, as assumed by appellants' counsel, the court was fully warranted by the record of the lawsuit in finding that the liability of the company was incurred prior to April 20, 1892.

⁶¹⁶ "In support of the contention that no liability occurred prior to April 20, 1892, counsel for appellants rely on the averment in the declaration, 'that on the first day of June, 1892, in consideration that said plaintiffs, at the request of said defendant, would procure a purchaser,' etc. But it is elementary that a statement of the precise time is not necessary, and that a plaintiff is not bound to prove the precise time stated. 'Thus, in assumpsit upon a contract, the day upon which it is made being alleged only for form, the plaintiff is at liberty to prove that the contract, whether it be express or implied, was made at any other time': 1 Chitty on Pleading, 9th Am. ed., 257; see, also, Kipp v. Bell, 86 Ill. 577. Such being the law, it cannot be assumed that the precise time laid in the declaration was the time proved on the trial.

"Section 1 of 'An act to amend an act entitled "Abatements," approved March, 1845, and to extend the time for closing up the affairs of corporations,' in force March 24, 1869 (Sess. Laws 1869, p. 1), is as follows: 'Be it enacted by the people of the state of Illinois, represented in the general assembly: That all corporations created by special acts or under general laws, and whose charter or acts of incorporation may have expired for any reason whatever, shall continue their corporate capacity during the term of two years for the sole purpose of collecting the debts due to said corporation, selling and conveying the property and estate thereof.' If this act applies to the Singer & Talcott Stone Company, then that company has power for at least two years after April 20, 1892, to sell and convey its property; but appellants' counsel, basing their argument on the words 'may have expired,' contend that it does not apply to that company but only to corporations created prior to its passage, and that the Singer & Talcott Stone Company was organized April 20, 1872, subsequently to the passage of the act. We cannot accede to this view. The act is general, applies in terms to all corporations, and is in part amendatory ⁶¹⁷ of chapter 1 of the Revised Statutes of 1845, entitled 'Abatements,'

which is a general law; and section 1, quoted *supra*, confers a special privilege, namely, an extension of corporate life for two years beyond the time fixed by the charter. No reason is perceived why the legislature should discriminate in favor of corporations organized prior to the passage of the act and against those thereafter organized. In *Ramsey v. Peoria Marine etc. Ins. Co.*, 55 Ill. 311, the court, commenting on the act in question, say: 'It was evidently the intention of the legislature to preserve to corporations whose charters might be forfeited or their organization dissolved, the right to collect their debts and sell their property,' etc. *Ramsey v. Peoria Marine etc. Ins. Co.*, 55 Ill. 316.

"In *Life Assn. of America v. Fassett*, 102 Ill. 315, one of the questions presented was, whether the corporate life of the association, which was a Missouri corporation, had become extinct by reason of a decree of the circuit court of St. Louis, entered October 16, 1879, declaring it insolvent and dissolving it. October 15, 1879, prior to the entry of the decree, an attachment had been levied on the land of the association in this state. The court, after referring to sections 10 and 25 of chapter 32 of the statutes, by the former of which sections the corporate capacity of corporations is extended as by section 1 of the act of 1869, say: 'From these and other provisions of the statute it clearly appears that it is a part of the settled policy of the state, at least so far as domestic corporations are concerned, that upon their dissolution, however that may be effected, they shall nevertheless be regarded as still existing for the purpose of settling up their affairs and having their property applied for the payment of their just debts, and we see no sufficient reason why the same policy should not, so far as practicable, be extended to foreign corporations that have property here and are located among us for business purposes.'

618 "We have no doubt that section 1 of the act of 1869 applies equally to corporations organized before and after its passage, which being true, the *Singer & Talcott Stone Company* had ample power to sell and convey its property at any time between April 20, 1892, and April 20, 1894, and it evidently acted with this understanding, the deed of the land from the company to Chapin being dated January 3, 1893, and sealed with the corporate seal of the company. And, if it had power to sell, it had power to employ an agent for that purpose. Indeed, being a corporation, it could act only by an agent.

"The special count in the declaration in the lawsuit is for commissions earned by appellees in the procuring the purchaser of the company's property, and the copy of the account sued on, which is, in substance, a bill of particulars, is for commissions earned in procuring the purchaser for the property, describing it, and limited appellees to proof of that claim. What has been said disposes of appellants' second and third objections.

"The objection that it was error to dismiss the bill against some of the defendant stockholders, and that the decree should have been that the claim of appellees should be paid by all the stockholders, they contributing ratably, is untenable. This is a creditor's bill, and not a bill under section 25 of the incorporation act to dissolve and close up the business of the corporation, and it is not necessary to make all stockholders defendants: *Young v. Farwell*, 139 Ill. 326; *Palmer v. Woods*, 149 Ill. 146; *Bartlett v. Drew*, 57 N. Y. 587; *Hatch v. Dana*, 101 U. S. 205.

"The case of *Bartlett v. Drew*, 57 N. Y. 587, approved in *Clapp v. Peterson*, 104 Ill. 35, was in its facts similar to the case at bar. In that case the plaintiffs had recovered a judgment against the New Jersey Steam Navigation Company, and an execution had been issued on the judgment and returned unsatisfied. Prior to the commencement of the suit in which the judgment was recovered, the navigation company had sold three of its steamboats and distributed ⁶¹⁰ the proceeds of the sale, seven hundred and fifty thousand dollars among its stockholders. The action was brought against the corporation and Daniel Drew, a stockholder, who had received as his share in the proceeds of the sale a much larger amount than the plaintiff's judgment. Drew objected, as do the appellants here, that the suit should be against all the stockholders, to the end that each might contribute his proportion of the plaintiff's judgment. The court overruled the objection, saying, among other things: 'We are of opinion that the plaintiff's right of action rests upon a very plain principle of equity. This is not a proceeding to dissolve and wind up the affairs of a corporation, or to marshal its assets, but the ordinary proceeding to collect a debt from a debtor unwilling to pay. . . . It is a very plain proposition that the stock and property of every corporation is to be regarded as a trust fund for the payment of its debts, and its creditors have a lien and the right to priority of payment over any stockholder. When stock and property have been divided between stockholders before all the debts of the corporation have been discharged, if any one stockholder is compelled to

pay more than his fair share of any unpaid debt he may resort to his associates for equitable contribution; but with that proceeding the creditor has nothing to do, unless he chooses to intervene to settle equities that may exist between his debtors.'

"That the capital stock and property of a corporation is a trust fund for the payment of its debts is fundamental in equity, and has been expressly recognized by the supreme court: *Clapp v. Peterson*, 104 Ill. 26; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133. Equity regards the assets of a corporation in the hands of stockholders as the property of the corporation and subject to the claims of creditors of the corporation. In *Bartlett v. Drew*, 57 N. Y. 587, the court say: 'Drew had a large amount of the assets in his possession which belonged to the corporation when the plaintiff's demand accrued, and some portion of which should have ⁶²⁰ been applied in discharge of its obligation to the plaintiff.' The supreme court of this state has also decided that a judgment creditor, complainant in a creditor's bill, has nothing to do with the equities as between the stockholders, and that when part only of the stockholders are made defendants, their remedy, if they desire equitable distribution of burden, is to file a cross-bill: *Clapp v. Peterson*, 104 Ill. 26; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133. In the present case, no cross-bill was filed nor was leave asked to file one. If it be suggested that this was unnecessary because all stockholders were originally parties to the bill, the obvious answer is, that appellees, having the right to proceed against part of the stockholders, clearly had the right to dismiss as to any of them, and the appellants were not warranted in presuming that they would not so do, and in omitting, on such presumption, to file a cross-bill. However, the remedy of appellants for equitable distribution of the burden of payment is not lost by this omission. They may file an original bill for that purpose, if they see fit so to do.

"Appellants further object to the refusal of the court to permit cross-examination of the witness Post, and to the exclusion of evidence offered by them on the merits of the claim of appellees which was reduced to judgment. All of Post's evidence having been excluded except that part of his testimony that the complainants in the present suit were the plaintiffs in the lawsuit, which evidence was unnecessary, the names being the same, the case stood as if Post had not been examined, and there was no ground for cross-examination. The evidence offered by appellants was properly excluded, because, the judgment being

conclusive against them, they had no right to a retrial of the suit at law. The evidence showed that each of the appellants has in his possession money of the Singer & Talcott Stone Company in amount largely in excess of the judgment against the company."

The judgment of the appellate court will be affirmed.

JUDGMENTS—CONCLUSIVENESS OF.—A judgment of a court of competent jurisdiction is conclusive as against parties and privies on all questions adjudicated by it: Note to *Bear v. Board of Commrs.*, 65 Am. St. Rep. 713.

A JUDGMENT AGAINST A CORPORATION is a judgment against the stockholders in their corporate capacity, and the stockholders are amply represented in the action: See monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 858.

A JUDGMENT AGAINST A CORPORATION IS CONCLUSIVE in a creditor's suit against the stockholders to compel the payment of their unpaid subscriptions: See extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 814; and, on principle, there is no reason why this rule should not apply in actions to enforce the statutory liability of stockholders for the debts of the corporation: Note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 858.

CORPORATIONS—CREDITOR'S SUIT—PARTIES.—The liability of stockholders to creditors is several. Hence, a creditor of a corporation may maintain a suit against a stockholder who has not paid for his stock in full, and such stockholder has no right to have the other stockholders made parties to the suit: *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133. See, further, the monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 857, 858.

WATTS v. DULL.

[184 ILLINOIS, 86.]

AN ADOPTION STATUTE, being in derogation of the common law of inheritance, must be strictly construed as against the adopted child.

JURISDICTION—COURTS OF GENERAL JURISDICTION. In the exercise of special statutory powers, a court of general jurisdiction is regarded as a court of limited and special jurisdiction, and its jurisdiction must appear from the record itself.

ADOPTION—RIGHT TO INHERIT.—A child by adoption cannot inherit from the adoptive parent unless the adoption has been had in strict accordance with the statute.

ADOPTION—HUSBAND NOT JOINING IN PETITION.—Under a statute providing that a married person cannot adopt a child unless the husband or wife of such person joins in the petition, a married woman cannot adopt a child unless her husband joins in the petition, even though the husband is insane and the wife is his conservator.

ADOPTION—PROCEDURE.—A PETITION in adoption proceedings is fatally defective if it fails to state, in accordance with

the requirements of a statute, the name and residence of the parents, whether the parents consent to such adoption, or that the parents deserted the child for one year next preceding the application.

Bill by an alleged adopted child to recover an interest in land owned by her adopted mother, who had died intestate, and praying for a partition, the setting off of the widower's dower, and an accounting. The property had been partitioned between her husband and her collateral heirs, but the adopted child (plaintiff) was not a party to the proceedings. A supplemental bill alleged the death of the husband and that the adopted child was the sole heir.

Frank B. Wetzel and Conrad G. Gumbart, for the appellant.

Lyman B. Vose and H. M. Tabler, for the appellees.

²⁰ MAGRUDER, J. It is necessary to consider only one question in this case, and that relates to the validity of the proceedings instituted in the county court of McDonough county by Catherine Jarvis for the adoption of the plaintiff in error as her child. If the decree of adoption was valid, then the partition proceeding, instituted by the collateral heirs of Catherine Jarvis and the conservator of her insane husband, Ephraim Jarvis, was invalid, because the plaintiff in error, as the legally adopted child of Mrs. Jarvis, was not made a party thereto. In such case, the master's deed executed to the defendant in error, D. B. Dull, in pursuance of the sale had under the partition proceedings, conferred no title, and was void. On the contrary, if the decree of adoption was void for want of jurisdiction in the court which rendered it, then plaintiff in error, not being the legally adopted child of Catherine Jarvis, inherited no interest in the land from her, and the title of the defendant in error, D. B. Dull, is a good title.

The present statute of Illinois in relation to the adoption of children was approved on February 27, 1874, and went into force on July 1, 1874: 1 Starr & Curtis' Annotated Statutes, 353. The right of adoption, as conferred by this statute, was unknown to the common law, and is taken from the Roman law. Being in derogation of the common law, it is a special power conferred by statute, and the rule is that such statutes must be strictly construed: *Brown v. Barry*, 3 Dall. 365; *Dwarris on Statutes*, 257; *Furgeson v. Jones*, 17 Or. 204, 11 Am. St. Rep. 808. In *Keegan v. Geraghty*, 101 Ill. 26, we said of the act of 1874: "As against the adopted child, the statute should be

strictly construed, ²¹ because it is in derogation of the general law of inheritance, which is founded on natural relationship, and is a rule of succession according to nature, which has prevailed from time immemorial."

The county courts in this state, in the exercise of the common law jurisdiction conferred by statute, are entitled to the same presumptions in favor of their jurisdiction as are the circuit courts: *Anderson v. Gray*, 134 Ill. 550, 23 Am. St. Rep. 696. But a court of general jurisdiction may have special powers conferred upon it by special statute; and, as these powers are not exercised according to the course of the common law, they do not belong to it as a court of general jurisdiction. In the exercise of such special statutory powers, a court of general jurisdiction will be regarded and treated as a court of limited and special jurisdiction; and in the exercise of these special statutory powers the jurisdiction must appear from the record itself; nothing will be presumed to be within the jurisdiction which does not distinctly appear to be so. Where special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class of subjects not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court: *Galpin v. Page*, 18 Wall. 350; *Morse v. Presby*, 25 N. H. 299; *Furgeson v. Jones*, 17 Or. 204, 11 Am. St. Rep. 808. A child by adoption cannot inherit from the adoptive parent, unless the adoption has been had in strict accordance with the statute: *Tyler v. Reynolds*, 53 Iowa, 146. In *Haywood v. Collins*, 60 Ill. 328, we said: "When a superior court exercises a special statutory and extraordinary power, it stands upon the same ground, and is governed by the same rules, as courts of limited and inferior jurisdiction. The rule, then, is that nothing shall be intended to be within the jurisdiction, but that which is so expressly alleged": See, also, *Johnson v. Von Kettler*, 84 Ill. 315.

²² Under section 1 of the Illinois act of adoption, the first step to be taken by a person, seeking the adoption of a child, is the filing of a petition. Section 2 of the act provides what must be stated in the petition. The petition, thus required by the act, is jurisdictional in its character; and the facts, which are required by the statute to give the court jurisdiction, must appear upon the face of the petition itself. Section 3 of the act

provides that the facts stated in the petition must be found by the court to be true, when it renders its decree.

Section 1 of the act of 1874 in relation to the adoption of children provides as follows: "The prayer of such petition, by a person having a husband or wife, shall not be granted unless such husband or wife joins therein, and, when they so join, the adoption shall be by them jointly." It appears from the petition for adoption introduced in evidence in this case that Catherine Jarvis, when she filed the petition, had a husband living, named Ephraim Jarvis. The husband, Ephraim Jarvis, did not join with Catherine Jarvis in the petition for the adoption of the plaintiff in error. The petition alleges that Ephraim Jarvis was insane, and that the petitioner, Catherine Jarvis, his wife, was his conservator. It was undoubtedly true that, as an insane person, Ephraim Jarvis was incapable of joining in the petition with his wife; but the statute does not make the insanity of either husband or wife an exception to the requirement that such husband or wife must join in the petition. It is not for the courts to make the law. The making of statutes is the province of the legislature. The petition is filed by Catherine Jarvis in her own right, and as an individual. It is not filed by her in her own right, and as conservator, although she mentions the fact that she is such conservator in the petition. Whether or not the county court, entering the decree of adoption, or some other court, upon application made to it for that purpose, would have permitted the conservator of the insane husband to join ^{as} in the petition for the adoption with the wife, it is not necessary here to determine. If such conservator could have joined with the wife in the petition, then, under the statute, the adoption would be a joint one by both the husband and the wife, or by the conservator of the husband and the wife. We are not prepared to say that, under such circumstances, an insane husband could be forced to adopt a daughter not of his own choosing, or that the conservator of an insane husband could be permitted to unite with the wife in such act of adoption. A joint adoption of this kind, if it were allowed to take place, would make the adopted child heir of its insane adopting father, and thus the property of that father would be made to pass away from the natural heirs without any intelligent consent or choice on his part. It is, at any rate, doubtful whether, under section 1 of the act, the wife of an insane husband can file a petition for adoption, or whether, if she can do so, the conservator of the insane husband can be allowed to join with her in such peti-

tion. Inasmuch as the provisions of the act, being in derogation of the common law, must be strictly construed, the right of adoption, under such circumstances, cannot be given where the meaning of the act is doubtful, or its language is not capable of definite construction: *Keegan v. Geraghty*, 101 Ill. 26.

Furthermore, section 2 of the act requires that the petition shall state "the name and residence of the parents of the child, if known to the petitioner." The petition in the case at bar states that the father of the child was dead, but it does not state the name and residence of the mother of the child, although the latter appears from the petition to have been alive. Of course, the name and residence of the parents of the child are only to be stated, if they are known to the petitioner. Inasmuch as this petition does not state whether such name and residence were known to the petitioner or not, the question arises whether it will be presumed that such name and residence⁹⁴ were unknown because there is no allegation on the subject. Under the general doctrine already announced, that everything will be presumed to be without the jurisdiction of the court, when proceeding under a special statute, which does not distinctly appear to be within it, it would seem that such presumption as to the name and residence being unknown would not be entertained, but that the petition, by omitting any allegation on the subject, is fatally defective. In construing the act of 1867 in regard to the adoption of children, where the petition was required to state "the name of the father, or, if he be dead or has abandoned his family, the mother, and, if she be dead, the guardian, if any, and the consent of such father or mother to the act of adoption," it was said in *Barnard v. Barnard*, 119 Ill. 92, that the fact of the father's death or abandonment was not required to be affirmatively stated; that the statute of 1867 only required, as a jurisdictional fact, that the parent be named who had the actual custody and guardianship of the child, and that it be shown that that parent consented to the adoption. It will be noted, however, that, in the *Barnard* case, the mother filed her written consent to the adoption of the child. Here, however, it does not appear that the mother of the plaintiff in error gave her consent to the adoption.

Section 2 of the act of 1874 provides that the petition shall state "whether the parents, or the survivor of them, or the guardian, if any, consents to such adoption." Here, the father being dead, the mother was the survivor within the meaning of the statute, but the petition nowhere alleges that such sur-

vivor gave her consent to the adoption. In this regard, the petition is fatally defective. It is true that the petition alleges that "the mother has deserted the child." It has been held under statutes differing in their provisions from our statute that, if one of the parents is dead, the consent of the survivor must be obtained, provided such survivor has not abandoned the child: 1 Am. & Eng. Ency. of Law, 2d ed., 729, 730. ⁹⁵ But if the allegation that the mother had deserted the child rendered it unnecessary to allege that she consented to such adoption, the desertion must have been such a desertion, and a desertion for such length of time, as the statute requires to be alleged in the petition.

Section 3 of the act provides that the court must be "satisfied that the parents of the child or the survivor of them has deserted his or her family, or such child, for the space of one year next preceding the application." Here, the petition does not allege that the mother has deserted the child for one year next preceding the application for the adoption; but the allegation is, merely, that the mother has deserted the child. Non constat that the desertion was for any longer period than one week or one day. Not only does the petition fail to state that the mother consented to the adoption, or that she deserted the child for one year next preceding the application, but the decree of adoption also fails to find that the desertion was for the space of one year next preceding such application.

Applying the principles above announced to the petition filed in this case, we are of the opinion that, in view of the language of the statute, the statements in the petition were not sufficient to give the court jurisdiction to enter the decree. The decree of adoption being void for the want of jurisdiction in the county court to render it, plaintiff in error inherited no interest in the land from Catherine Jarvis. It follows that the partition proceeding, and the deed made in pursuance thereof to the defendant in error, D. B. Dull, were not void on account of the failure to make plaintiff in error a party to said proceeding.

Accordingly, the decree of the circuit court, dismissing the original and supplemental bills, is affirmed.

ADOPTION IS PURELY A STATUTORY MATTER, and to give validity to proceedings relating thereto they must have been conducted in substantial conformity with the provisions of the statute; but the statute must be given a liberal construction in order to uphold the validity of proceedings under it: *Nugent v. Powell*, 4 Wyo.

173, 62 Am. St. Rep. 17. Compare *Furgeson v. Jones*, 17 Or. 204, 11 Am. St. Rep. 808; and see the extended note to *Van Matre v. Sankey*, 39 Am. St. Rep. 213-218.

IN ADOPTION PROCEEDINGS THE PETITION is liberally construed: See monographic note to *Van Matre v. Sankey*, 39 Am. St. Rep. 220.

ADOPTION—RIGHT TO INHERIT.—An adopted child is, in a legal sense, the child both of its natural and of its adopting parents, and is entitled to inherit from both: *Clarkson v. Hatton*, 143 Mo. 47, 65 Am. St. Rep. 635. See, further, the extended note to *Van Matre v. Sankey*, 39 Am. St. Rep. 223-229.

HARBAUGH v. COSTELLO.

[184 ILLINOIS, 110.]

BANKRUPTCY—NATIONAL ACT OF—STATE LAWS.—A national bankruptcy act, from the time it goes into effect, suspends the operation of state insolvency laws, and a state court has no jurisdiction over assignment proceedings, begun after the national act goes into effect.

BANKRUPTCY—NATIONAL ACT—WHEN TAKES EFFECT.—The provision of the national bankrupt act that the filing of petitions shall be postponed for a stated time does not prevent the act from becoming operative from the date of its passage, and a state insolvency law is superseded from and after that date.

George E. Waite and George W. Shaw, for the appellant.

Graves & Brown, for the appellees.

MAGRUDER, J. The petition of the appellees to the county court was demurred to upon the ground that the voluntary assignment law of this state had been superseded by the bankrupt law passed by Congress on July 1, 1898, and that, therefore, the county court had no jurisdiction to make the order entered by it. The only question necessary to be considered is, whether the county court had jurisdiction to proceed under the state assignment law, and make an order for the return of the property to the assignee, in view of the passage by Congress of the bankruptcy act of July 1, 1898.

It is provided in section 8 of the first article of the constitution of the United States, that "Congress shall have power . . . to establish . . . uniform laws on the subject of bankruptcies throughout the United States." In interpreting this provision of the constitution, it has been held that the power to pass insolvent or bankrupt laws was not thereby taken away from the states until Congress itself should exercise the power

thereby conferred by the passage of a bankrupt law. When, however, a bankrupt law is passed by Congress, any state law upon the subject which may exist is suspended in its operation. As soon as a national bankruptcy act goes into effect, state insolvency laws are suspended, and become inoperative, at least so far as they conflict with the act of Congress upon the subject, and so far as they embrace the same subject matter as is embraced in the act of Congress: *Sturges v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 12 Wheat. 213; *In re Klein*, 1 How. 277; *Tua v. Carriere*, 117 U. S. 201; *Chamberlain v. Perkins*, 51 N. H. 336; *In re Damon*, 70 Me. 153.

¹¹⁴ In *Tua v. Carriere*, 117 U. S. 201, it was said by the supreme court of the United States that if the insolvent law of Louisiana, there under consideration, had been enacted before the passage of the bankrupt act, it would have been valid, and that the effect of the bankrupt act would have been to suspend it only while the bankrupt act remained in force, and, on the repeal of the latter act, the insolvent law would have revived. A national bankruptcy law, so long as it is in existence, suspends all state laws on the same subject. The doctrine is thus stated by Black in his recent work on Bankruptcy, on page 271: "The passage of a national bankruptcy law by Congress renders it supreme. The state laws in force must yield to it and can no longer operate upon persons or cases within the purview of the federal statute. The latter does not, indeed, repeal or destroy the state laws on the same subject, but it suspends their operation. If the state law and the federal act operate upon the same subject matter, upon the same property, upon the same rights, and upon the same persons, creditors as well as debtors, or may so operate, they cannot go together without direct and positive collision, and, in such case, the federal enactment suspends or supersedes the state law." The weight of authority is in favor of the doctrine as thus announced, although there are some cases which hold that the state insolvency law only becomes suspended as to a particular debtor when the bankrupt court adjudges such debtor a bankrupt and seeks to distribute his estate among his creditors. The case upon both sides of the question may be seen by reference to the text-books upon the subject of bankruptcy: *Bump on Bankruptcy*, 11th ed., 96-102; *Collier on Bankruptcy*, 427-443.

It is unnecessary to discuss the provisions of former bankruptcy laws for the purpose of drawing a distinction between their phraseology, and that of the national bankruptcy law of

1898. It is sufficient to consider a few of the provisions of the latter act.

¹¹⁵ The last provision of the bankruptcy law of 1898 is as follows: "Proceedings commenced under state insolvency laws before the passage of this act shall not be affected by it": *Brandenburg on Bankruptcy*, 547. This provision, under the familiar rule of statutory construction that the expression of one thing is the exclusion of the opposite, means that no proceedings under state insolvent laws shall be commenced after the passage of the act of 1898. The plain implication is, that proceedings commenced under state insolvency laws after the passage of the act of 1898 are unauthorized. The last provision of the act of 1898 was thus construed by the supreme court of Massachusetts in the recent case of *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178, 70 Am. St. Rep. 258, and it was there held that the bankruptcy act of 1898 so far superseded the insolvency laws of the state from the time of its passage as to deprive the state courts of jurisdiction to entertain petitions for the commencement of insolvency proceedings filed after said date.

In the provision of the act of July 1, 1898, next preceding the provision above quoted, are the following words: "This act shall go into full force and effect upon its passage": *Brandenburg on Bankruptcy*, 547. The evident meaning is, that the rights of persons coming within the terms of the act are to be determined by the act from the time of its passage. The various provisions of the act, affecting the rights and conduct of creditors and debtors, supersede all conflicting provisions in the state insolvency laws. It is true that the right to file a petition for voluntary bankruptcy is postponed one month, and the right to file a petition for involuntary bankruptcy is postponed four months: *Brandenburg on Bankruptcy*, 547. But, "whenever the proceedings [under the act] are commenced, the conduct of the parties after the passage of the act is to be tested by its requirements": *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178, 70 Am. St. Rep. 258. The postponement of the filing of the petitions—in the one case for one month, and in the other ¹¹⁶ for four months—does not militate against the view that the bankruptcy law was operative from the date of its passage, and from and after that date superseded any state insolvency law: *In re Rouse*, 91 Fed. Rep. 96; *In re Bruns-Ritter Co.*, 90 Fed. Rep. 651.

In the case at bar, the assignment proceedings in the county court were not begun until July 16, 1898, after the bankruptcy law went into effect. When, therefore, the proceedings in the county court were begun, the operation of the assignment law had been suspended, and the county court had no jurisdiction to enter the order requiring the appellees to give up the property levied upon to the assignee. In the absence of a bankruptcy law, the county court undoubtedly had jurisdiction to try the right to the property levied upon as between the appellees and the assignee: *Wilson v. Aaron*, 132 Ill. 238. Such jurisdiction is merely ancillary to the special jurisdiction to administer insolvent estates, as conferred upon the county court by the assignment law.

The assignment act of Illinois has been held to be a general insolvent law, and it was so intended by the legislature: *Hanchett v. Waterbury*, 115 Ill. 220; *Farwell v. Cohen*, 138 Ill. 216. It thus being a state insolvency law, the proceedings commenced under it after the passage of the bankruptcy law of July 1, 1898, were unauthorized, its operation having been suspended by the bankruptcy law.

It is true that an insolvent law is a law for the relief of creditors by an equal distribution among them of the assets of the debtor, and does not necessarily involve the discharge of the debtor while a bankrupt law secures the relief of the insolvent debtor by his discharge. The object of a bankrupt law, however, is not merely to discharge the debtor, but its object, prior to such discharge, is to secure an equal distribution of the property of the bankrupt debtor among his creditors: *Boese v. King*, 108 U. S. 379; *Mayer v. Hellman*, 91 U. S. 496; *Buchanan v. Smith*, ¹¹⁷ 16 Wall. 277. So, also, the main object of the Illinois voluntary assignment act is to secure equality of right among the creditors of a debtor, who makes a voluntary assignment of his property: *White v. Cotzhausen*, 129 U. S. 329. Inasmuch, therefore, as the bankruptcy act of 1898, and the Illinois voluntary assignment act both operate upon the same subject matter, to wit, the assets of the bankrupt, and upon the same persons, to wit, the bankrupt and his creditors, and in the same way, or upon the same rights, to wit, the pro rata distribution of said assets among said creditors, they cannot be in force together without direct and positive collision. It necessarily follows that the federal act suspends or supersedes the state law: *In re Curtis*, 91 Fed. Rep. 737.

In addition to what has been said, section 3 of the act of July 1, 1898, says that making "a general assignment for the benefit of his creditors" by any person is an act of bankruptcy: *Brandenburg on Bankruptcy*, 520. The consequence of such an assignment, if allowed to stand, would be to withdraw the estate from the administration of the court of bankruptcy, and so defeat the operation of the bankrupt law: *Black on Bankruptcy*, 20. The fact that the making of a general assignment under the state law for the benefit of creditors is made an act of bankruptcy is of itself sufficient to authorize the federal court, under the act, to take the same property at the instance of the same creditors and distribute it among the same creditors in the same proportion. Ordinarily, this could not be done under the general doctrine that, where one court gets jurisdiction of the subject matter and of the person, it will retain such jurisdiction until the final determination of the controversy and cannot be disturbed in the exercise thereof by any court of co-ordinate jurisdiction. If, upon making a general assignment under the state law for the benefit of his creditors, the debtor commits an act of bankruptcy, and a federal court of bankruptcy can seize the property ¹¹⁸ so assigned, then the state court, acting under the state law, has not such jurisdiction as authorizes it to proceed in the manner contended for in this case. It is manifest that Congress intended that all laws clothing the state courts with a special jurisdiction in insolvency matters should be superseded by the bankruptcy law.

The constitution of the United States specifies uniformity as the special characteristic of bankrupt laws to be passed by Congress. If state laws are to remain operative, and state courts are to exercise jurisdiction in the distribution of insolvent assets, then there is no uniformity in the law governing the subject, as the insolvent law of each state differs more or less from that of every other state. The continued exercise of jurisdiction by the state courts in such cases would be an infringement of the constitutional requirement as to uniformity. It is well said by the appellate court in their decision of this case: "If, however, upon the enactment of a bankruptcy law, the judicial distribution among creditors of the property of insolvent debtors who desire their property distributed to their creditors, and of insolvent debtors who have been guilty of an act of bankruptcy, is committed exclusively to the courts of bankruptcy appointed by such law, then we have a uniform system by which such distribution may be effected through the medium of courts."

We are of the opinion that the county court erred in entering the order against appellees for the restoration of the property levied upon to the appellant, and that said court had no jurisdiction in the insolvent proceeding instituted before it under the assignment act, by reason of the fact that the operation of that act had been suspended after July 1, 1898, by the passage on that date of the national bankruptcy law.

The judgment of the appellate court is affirmed.

BANKRUPTCY—FEDERAL STATUTE.—The United States bankruptcy law of 1898 supersedes all state laws in regard to insolvency from the date of the passage of the statute. Hence, insolvency proceedings commenced in the state courts after the passage of that law are unauthorized: *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178, 70 Am. St. Rep. 258.

AKERS v. CLARK.

[184 ILLINOIS, 126.]

WILLS—LAWS OF DESCENT.—A DEVISE giving precisely the same estate and interest in property as the devisee would take by descent if the devise had not been made is void, for the reason that a title by descent is regarded as a better title than by devise or purchase.

DEEDS—LIFE ESTATE—REMAINDERS—REVERSIONS.—A deed granting a life estate and containing the words "and at her death to revert back to my heirs," is the grant of a life estate only, and no remainder being created, the fee remains vested absolutely in the grantor, and upon the death of the life tenant, the property reverts to the grantor or his heirs. The grantor being a reversioner in point of time can dispose of the fee absolutely by will or by deed.

Neal & Wiley, for the appellant.

John McNutt, Jr., and James W. & Edward C. Craig, for the appellee, Eliza Jane Snapp.

¹²⁶ **PHILLIPS, J.** On the eleventh day of October, 1892, William Clark conveyed the west half of the northeast quarter of section 33, township 12 north, range 7 east, of the third principal meridian, to Mary J. Clark. The deed contains the following language: "William Clark conveys and warrants to Mary J. Clark during her natural life and at her death to revert back to my heirs." Clark died December 20, 1897, leaving him surviving Mary J. Clark, the grantee in that deed, his

widow, and certain children and grandchildren, as his only heirs at law. On the twenty-ninth day of November, 1897, said Clark executed a will, by which he devised the fee in the premises in the deed described to his daughter, Eliza Jane Snapp, subject to the life ¹³⁷ estate of Mary J. Clark, which will was duly probated. The will contains this language: "I will and devise to my beloved daughter, Eliza Jane Snapp, wife of Jonathan Snapp, the farm on which I now reside at the death of my beloved wife, Mary, in accordance with the deed above mentioned, to her and her heirs forever." Certain of the children of Clark filed a bill for partition, making certain grandchildren and Eliza J. Snapp defendants. The latter answered, setting up the execution of the deed with the clause as stated, and averring the execution of the will, duly probated, etc. The evidence was in accordance with the answer, and on hearing a decree was entered dismissing the bill for want of equity. The complainants prosecute an appeal to this court, and assign as errors the failure to render a decree for partition and the dismissal of complainants' bill.

It is stated by Washburn in his work on Real Property, volume 2, page 242: "It is accepted as one of the dogmas of the common law that if one makes a limitation to another for life, with a remainder over, either mediately or immediately, to his heirs or the heirs of his body, the heirs do not take remainders at all, but the word 'heirs' is regarded as defining or limiting the estate which the first taker has, and his heirs take by descent, and not by purchase. So if a man by his will gives an estate to his devisee for life, with a remainder over to his own heirs, they do not, at common law, take as remaindermen by the will, but by descent as reversioners and heirs, that being regarded as the better title. The statutes in several states have changed the rule in Shelley's case, so that in similar cases the heirs now take as remaindermen. But such a remainder is contingent during the life of the first taker."

A devise giving precisely the same estate and interest in property as the devisee would take by descent if the devise had not been made is void, for the reason that a title by descent is regarded as a worthier or better title ¹³⁸ than by devise or purchase: *Kellett v. Shepard*, 139 Ill. 433. The grant in this case, by this deed, was a life estate to Mary J. Clark. The grantor could have no heirs until after his death and, by the insertion of the words "and at her death to revert back to my heirs," the conveyance with reference to the inter-

est remaining after the life estate ended would necessarily revert to the grantor, or by descent the reversion would pass to his heirs. This would result in exactly the same way if the words "and at her death to revert back to my heirs" were omitted from the deed. It was not a grant of a life estate to Mary J. Clark and remainder to any person, and, it being the case that whilst living he could have no heirs, the fee remained vested absolutely in the grantor, with a life estate carved thereout in favor of the grantee named in the deed.

Without, however, rejecting any word in the conveyance, by the terms of the deed the heirs would take as reversioners and not as remaindermen. It is said in Washburn on Real Property, page 395: "At common law, if a man seised of an estate limited it to one for life, remainder to his own right heirs, they would take not as remaindermen, but as reversioners; and it would be, moreover, competent for him, as being himself the reversioner, after making such a limitation, to grant away the reversion." The same principle was announced in *Hobbie v. Ogden*, 178 Ill. 357, where it was held that a trust deed made to carry out a divorce decree by carving out an equitable life estate for the use of the grantor's divorced wife, which provided that upon the termination of the life estate the trustee should reconvey to the grantor "or his heirs," does not create a remainder in anyone, but merely stipulates for a reconveyance of the title, which equitably remained in the grantor subject to the trust, and that the grantor's devisee might enforce the reconveyance in equity. By the deed in this case no vested interest passed to anyone but Mary J. Clark. The remainder, after the expiration ¹⁸⁰ of her life estate, under the law as well as under the deed, reverted to the grantor or his heirs. He being a reversioner first in order of time, might dispose of the fee absolutely by will or by deed. The devise to Eliza Jane Snapp passed the entire estate in reversion.

It was not error to dismiss complainants' bill. The decree of the circuit court of Coles county is affirmed.

Effect of Wills Devising or Bequeathing to an Heir What He, in the Absence of Such Will, is Entitled to under the Law of Succession.

The question is stated broadly to cover both a devise of real property and a bequest of personal property. The statement in the principal case is limited to a devise of real property, and the property there concerned was real estate alone. The rule has been the subject of scant judicial construction in this country, so much so that its existence would seem to be a question of some doubt. In

England the rule has been abolished by statute. We are forced to go back to early English cases to find the reasons for the rule, and from these reasons to ascertain, if possible, what application the rule has to our modern law. The American authorities make little attempt to state the reason for the rule, or even the extent of its application, being content with a bare statement of what the rule is supposed to be.

The rule has sometimes been stated thus, that to give a thing by will to a person to whom the law gives it, is as if it had not been given: Bacon's Abridgment, Wills, G; Preston v. Holmes, Style, 148. Or again: "Where a testator makes the same disposition of his estate as the law would have done if he had been silent, the will, being unnecessary, is void": Biedler v. Biedler, 87 Va. 300. Such statements are general, and it is probably such general wording that has caused the rule to be stated as if it were applicable to every gift of whatever kind of property. The rule, however, as evidenced from its origin and its reason, should be stated as follows: "A devise to the heir at law is void if it gives precisely the same estate that the heir would take by descent if the particular devise to him was omitted out of the will": 4 Kent's Commentaries, 506; 2 Minor's Inst. 1045; Hainsworth v. Pretty, Cro. Eliz. 833, 919. The test of the rule by which to determine its applicability to any particular case is to strike out of the will the particular devise to the heir, and if he would still take the same interest as the will gives him, the devise is void, and the heir takes the property by descent and not by purchase: 2 Minor's Inst. 1045; 4 Kent's Commentaries, 507; Bear's Case, 1 Leon. 112. It is necessary, however, that the will should give to the heir exactly the same estate as he would take by descent, otherwise the rule has no application. If there is but one heir at law, which was always the case in England at common law when there was a son, a devise of the real property would give to the heir at law precisely the same estate, both in quantity and in quality, as he would take by descent in the absence of a will. The devise would, therefore, be void, and the heir at law would take the property by descent as an heir and not by purchase as a devisee: Biedler v. Biedler, 87 Va. 300; 2 Minor's Inst. 1045. If there was more than one heir, however, a devise to them would not, at common law, give them the same estate in quality as they would take by descent, and the devise in consequence would be valid. Under such a will, several coheirs would take the same estate in quantity as they would take by descent, but its quality was different. As heirs they would take by descent as coparceners, while under the will they would take the devise as joint tenants or as tenants in common, or, if there was a separate devise to one of the coheirs, he would take it in severalty. In any event, at common law, if there were coheirs, a devise would always give a different estate in quality, and would therefore be valid, for coheirs must take as coparceners by descent and an estate in coparcenary could be created in no other way: See Bear's

Case, 1 Leon. 112; Anonymous, Cro. Eliz. 431; Reading v. Royston, 1 Salk. 242; Swaine v. Burton, 15 Ves. 365; Biedler v. Biedler, 87 Va. 300; 2 Minor's Inst. 1045.

In the United States the doctrine of primogeniture has never prevailed, so that if there was more than one child, all would share in the distribution of the estate of their father. If perchance there was but one child, a will devising the real property to such child would give him precisely the same estate as he would take by descent, and the devise would, in consequence, be void. On the other hand, if there was more than one child to inherit the property, the question might be different. If these children would take the property by descent as coparceners, then a will would undoubtedly give them a different estate in quality, and the devise in the will must be good. So that at the present day, in those states where estates by descent are held by the heirs as coparceners, a devise to heirs of the same quantity of real property as they would take by descent should be good, since it gives an estate of a different quality than that which they would take by descent. An estate by descent would be held as coparceners, while the same quantity of estate devised would be held either as joint tenants or as tenants in common. Estates in coparcenary exist, we believe, in Arkansas, Colorado, Delaware, Florida, Kentucky, Missouri, Ohio, Virginia, West Virginia, and Wyoming, and perhaps in some few other states. In these states a devise to coheirs of the same quantity of estate as they would take by descent should be a valid devise, since they would take it as joint tenants or tenants in common, while by descent the same property would be acquired by them as coparceners. Aside from Biedler v. Biedler, 87 Va. 300, we are not aware that the question has been treated in any of these states, but there seems to be no reason for believing that a contrary doctrine would be announced. In many of the states, estates in coparcenary are unknown. This is true in Alabama, California, Georgia, Indiana, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and South Carolina, and perhaps elsewhere. In such states it is very probable that an ordinary devise to heirs of real property would give the same estate both in quantity and in quality as they would take by descent, and the devise would, in consequence, be void, because unnecessary. The heirs must, however, take precisely the same estate by will as by descent in order to invalidate the devise. Hence, if the devise gives an estate in severalty to each heir, though the quantity of the estate may be the same, the devise should prevail, since by descent the heirs would take as joint tenants or tenants in common.

A devise to trustees to manage and control the estate and subsequently to divide it among the heirs would seem to give a different estate than that which the heirs would take by descent. The descent is broken by such a devise, and the heirs take by purchase the estate which is subsequently conveyed to them by the trustees: Swaine v. Burton, 15 Ves. 365. The fact that lands devised to the

heir are charged with debts does not make the estate devised different from that which he would take by descent, and the heir takes by descent, the devise being void: *Clerk v. Smith*, 1 Salk. 241; *Allam v. Heber*, *Strange*, 1270; *Hurst v. Earl of Winchelsea*, 1 W. Black. 187; 4 Kent's Commentaries, 507. The same is true where the devise to the heir is upon a condition, as, for example, where lands are devised to the heir, and in case he should not attain the age of twenty-one, then to some one else. The descent is not broken and the quantity and quality of the estate are the same: *Doe v. Timins*, 1 Barn. & Ald. 530; *Hainsworth v. Pretty*, Cro. Eliz. 833, 919; *Manbridge v. Plummer*, 2 Myne & K. 93. In this last case the court said: "It has always been the established doctrine that a charge upon an estate devised to the heir does not break the descent; how, then, will a condition operate? The charge partially affects the devise, the condition wholly affects it; and it being determined that a charge, which carries off a part, does not break the descent, neither does a condition, which in a particular event would carry off the whole, break the descent."

The rule that a devise to an heir of the same estate he would take by descent is void, and that the heir takes by descent notwithstanding the devise, prevails, in England, in the case of copyhold estates as well as in freehold estates: *Smith v. Triggs*, *Strange*, 487. It seems to be a matter of some doubt whether the doctrine extends to testamentary appointments. An appointment by will under a settlement usually operates as a common devise. If the person who executes the power of appointment is also the owner in fee of the lands sought to be conveyed by the power of appointment, then the doctrine would seem to apply, since in such case it is nothing more than an ordinary devise to an heir of that which he would take by descent in any event: See *Hurst v. Earl of Winchelsea*, 1 W. Black. 187; *Langley v. Sneyd*, 7 J. B. Moore, 165. If, on the other hand, the person who executes the power of appointment is not the owner in fee of the lands conveyed by the power, it is difficult to see how the heir could take by descent, and it would seem that he must take under the power, if at all. As was pointed out in the note to *Hurst v. Earl of Winchelsea*, 1 W. Black. 187: "Upon what solid principle a man can be held to take that by descent which never vested, or had a chance of vesting in his ancestor, it is not easy to conceive. Will anyone say that anything can descend to the heir that did not vest in the ancestor?" This is certainly sound, and the cases do not attempt to apply the doctrine where the ancestor, who is executing the power of appointment, is not also the owner in fee of the lands conveyed: See the remark of Justice Park in *Langley v. Sneyd*, 7 J. B. Moore, 163.

Is the doctrine, that a devise to an heir of precisely the same estate that he would take by descent is void, applicable to bequests of personal property? From the reason and the history of the rule it would seem that it was not applicable to bequests of personal property. The original reasons for the rule seem to have been based, first, upon the old feudal tenure; and second, upon the

rights of creditors. A confusion of titles by descent and titles by purchase, "in feudal times, would have affected the tenure of lands," says Mr. Minor, "and at a later period would have impaired the interests of creditors, certain of whom could charge with their debts lands descended, but not lands devised": 2 Minor's Inst. 1045; Biedler v. Biedler, 87 Va. 300. Under the system of holding lands in feudal times the overlord possessed certain rights and interests which would be materially impaired if his tenant were permitted to devise to his heir the estate which, in the absence of the devise, he would take by descent. To preserve these rights and to prevent a confusion in titles seems to have been one substantial reason for adopting the rule under discussion: See Bacon's Abridgment, tit. "Remainder," B, 2; Biederman v. Seymour, 3 Beav. 368. The second reason was adopted in the interest of creditors, whose rights would be impaired if the lands were devised to the heir instead of descending to him as they otherwise would. It was both to the interest of creditors and convenient that the property should be assets in the hands of the heir: Chaplin v. Leroux, 5 Maule & S. 14; Biederman v. Seymour, 3 Beav. 368. Another reason assigned for the rule is that the title by descent is, in the estimation of the law, a worthier title than one by purchase, and therefore the heir will take by descent in preference to taking by purchase under the will: Whitney v. Whitney, 14 Mass. 88; Parsons v. Winslow, 6 Mass. 169, 4 Am. Dec. 107; Ellis v. Page, 7 Cush. 161; Kellett v. Shepard, 139 Ill. 433.

None of the reasons heretofore given for the rule has any application to personal property. Such property was never held in feudal tenure, and the reasons springing from such a system of holding property could have no possible relation to personal property. Again, personal property has always been subject to the payment of the debts of a decedent, so that no reason, such as was found necessary in the case of realty, was required in order to protect the rights and interests of creditors in the personality of a deceased ancestor. The rule, as it is found in the English cases heretofore cited, is repeatedly stated as applying to a "devise" to the "heir at law" of property which he would otherwise take by "descent." All of these terms signify real property—never personalty. A devise relates to real property, a bequest to personal property. The heir at law refers solely to the person to whom the real property descends. Title by descent means the title by which one person, upon the death of another, acquires the real estate of the latter as his heir at law. The entire terminology which has from the beginning been used to define and explain the doctrine is confined to words associated with the law of real property. Personal property was never acquired by descent, so that such a title being a worthier title would have little meaning as applied to personalty. The only reason suggested which would have any connection with personal property is the principle that a man shall not have by gift that which is his own without gift. This would cover any and all kinds of property, but in the case in which this reason is suggested,

the point was not raised, since personal property was not concerned: *Biederman v. Seymour*, 3 Beav. 368. Certainly, the rule in its origin and its reason has no reference to personal property, and it seems never to have been applied to that class of property in England. In the only case we have noticed in which a personal estate was concerned—*Swaine v. Burton*, 15 Ves. 365—where a leasehold interest in land was given by will along with real property, the court, in holding that the leasehold interest was not taken by descent but by purchase under the will, dismissed this question with the simple statement that “there can be no doubt that the leasehold estate in equity would be taken by them [the devisees] as purchasers.” There seemed to be no question in the mind of the court as to this class of property. The difficulty lay with reference to the real estate. The American authorities, which have discussed the rule but slightly and analyzed it imperfectly, seem to have drawn no distinction between real and personal property. *Parsons v. Winslow*, 6 Mass. 160, 4 Am. Dec. 107, seems to be the only case which has directly applied the doctrine both to a devise of real property and to a bequest of personal property. Other cases, however, take no notice of any difference between the two classes of property, and would seemingly apply the rule to both realty and personalty: See *Kellett v. Shepard*, 139 IH. 433. *Ellis v. Page*, 7 Cush. 161, seems to correctly limit the doctrine to devises of land to an heir, and such would seem to be the effect of *Biedler v. Biedler*, 87 Va. 300. What effect those statutes have which declare that both real and personal property shall be succeeded to in the same manner seems never to have been passed upon: See Cal. Civ. Code, sec. 1384. There would seem to be no reason why such a statute should change the common-law rule.

We have stated that a devise such as we have been considering is void. It has been held to be valid for one purpose, however, or, more properly speaking, the heir has the rights of a devisee in one case. This arises where property is devised to the heir and to others, and it becomes necessary to take some of the property of the heir for the payment of debts. The creditors have a right, in England, to resort to the property inherited by the heir before they can lay any claim to the property given to other devisees. But in such a case the heir has the same rights as the other devisees to his share of the estate, and he is entitled to contribution from the other devisees, to the extent to which his estate may be exhausted by debts. The burden of the debts is borne ratably by the devisees, the heir being treated, for this purpose, as one of the devisees: *Biederman v. Seymour*, 3 Beav. 368.

In conclusion, there would seem to us to be no substantial reason for the existence in this country of the doctrine we have been discussing. The original reasons for its existence have long since passed away, in fact never existed here, and the more recent reasons seem entitled to but little more weight. To what extent the doctrine would be held to exist in the various states if the question should arise is purely a matter of conjecture.

HUNTER v. CLARKE.

[124 ILLINOIS, 124.]

APPEAL—FINDINGS—CONCLUSIVENESS OF.—A finding by a court as to existence of an agency, which would be a question for the jury upon a jury trial, is binding upon a court of appeals.

NEGOTIABLE INSTRUMENTS — NEGOTIABILITY. — A PROVISION in a note that upon a certain contingency the holder shall have the option to declare it due before the date fixed for its maturity does not destroy its negotiability.

NEGOTIABLE INSTRUMENTS — STIPULATIONS IN MORTGAGE—EFFECT ON NOTE.—The amount to be paid on a note is not rendered uncertain by stipulations in a mortgage, given to secure it, for costs, taxes, assessments, insurance, and attorneys' fees in case of foreclosure, and the note is negotiable notwithstanding such provisions.

James M. Graham and Beach & Hodnett, for the appellant.

Humphrey, McAnulty & Allen, for the appellee.

¹⁵⁸ CARTWRIGHT, C. J. Sarah J. C. Clarke, appellee, brought this suit in assumpsit in the circuit court of Sangamon county against John B. Hunter, appellant, upon a principal note and ¹⁵⁹ two interest notes given for semi-annual interest thereon. The principal note declared on is as follows:

"\$5,000.

Springfield, Ill., February 20, 1889.

"On March 1, 1894, after date, value received, for money loaned, I promise to pay to the order of Edward T. Oliver five thousand dollars, with interest on the same at the rate of eight per cent per annum, after due, until paid, according to the tenor of a certain mortgage deed, bearing even date herewith, given by John B. Hunter and wife to Edward T. Oliver. Payable at the State National Bank, with exchange.

"JOHN B. HUNTER."

Plaintiff also set out the mortgage mentioned in said principal note, which secured the same and the notes given for interest up to its maturity. The mortgage provides that in case of the neglect or refusal to pay any of said notes when due, or in case of waste or nonpayment of taxes and assessments, or neglect to insure or keep insured the buildings on the mortgaged premises for the benefit of the mortgagee, the principal note, with all accrued interest thereon, should become due and payable at the option of the legal holder thereof, and the mortgage might then be foreclosed. Defendant pleaded the general issue and payment, and to the latter plea there was a replication

denying payment. A jury was waived, and there was a trial before the court, resulting in a finding and judgment for defendant. Plaintiff appealed to the appellate court, and that court reversed the judgment of the circuit court and rendered final judgment for the amount due by the terms of the note, incorporating in its judgment the following finding of facts: "We find that at the time the appellant purchased the instrument sued on the same was not due; that no part of the principal had ever then been paid; that the amount of three thousand dollars remitted by Caleb K. Lucas to Brinkerhoff & Oliver to be applied on the note was never in fact paid to the holder of the note; that in receiving such remittance Brinkerhoff & Oliver were the agents of Lucas, and that appellant, at the time of receiving the note, ¹⁶⁰ had no notice of such remittance. And the court further finds that there is now due appellant upon said note the sum of three thousand nine hundred and forty-five dollars."

At the trial it was not disputed that the plaintiff purchased the note in good faith, before maturity, for its face value, with accrued interest, without notice of any payment or defense, as found by the appellate court. The next finding, that no part of the principal had been paid when plaintiff purchased the note, and that Brinkerhoff & Oliver were agents of Lucas in receiving money to be applied on the note, is a conclusion of fact upon the controversy raised on the plea of payment. The evidence on that subject tended to prove the following facts: Defendant borrowed the amount of the note from Brinkerhoff & Oliver, a firm of which Edward T. Oliver was a partner. Shortly after the note and the mortgage were made, the payee, Edward T. Oliver, sold and delivered the same to David Saunderson, trustee, and indorsed the note. The defendant, Hunter, maker of the note, sold the land, and on April 15, 1891, Caleb K. Lucas, owner of the premises, applied to Brinkerhoff & Oliver for the privilege of making a payment of three thousand dollars, although the note was not due. They told Lucas they would let him know in a week or two, and afterward wrote him that they had made arrangements for him to make the payment, and on the receipt of three thousand one hundred and twenty dollars would credit the principal note with three thousand dollars and interest on the same to May 1, 1891. The balance to be remitted consisted of a charge of one per cent on account of prepayment. On April 27, 1891, Lucas remitted by draft to Brinkerhoff & Oliver the said sum of three thousand

one hundred and twenty dollars. The note was not credited with the payment, and they never accounted to Saunderson or paid him the three thousand dollars. They paid the interest on the full sum of five thousand dollars to Saunderson until February 18, 1892, when they repurchased the note and mortgage from him. Lucas continued to pay interest to Brinkerhoff & Oliver on the remaining two thousand dollars only. On March 18, 1892, Brinkerhoff ¹⁶¹ & Oliver sold and assigned the note to plaintiff for five thousand and fifteen dollars. On November 10, 1893, Lucas learned that plaintiff had bought the note and mortgage March 18, 1892, and he afterward paid the remaining two thousand dollars and interest thereon to plaintiff.

It is contended that the finding of the appellate court respecting agency is not binding upon this court, but that, there being no contradiction in the evidence, the question of agency is a matter of law to be passed upon by this court. It is a question which, upon a jury trial, must be submitted to the jury under proper instructions from the court, and the finding is therefore binding upon this court: *St. Louis etc. Stock Yards v. Wiggins Ferry Co.*, 102 Ill. 514; *Everts v. Lawther*, 165 Ill. 487. The only question we can consider is whether the facts found by the appellate court are sufficient in law to justify the judgment of that court. Looking at the findings to determine that question, it will be apparent that if the plaintiff purchased the note before maturity, without notice of the remittance of three thousand dollars to Brinkerhoff & Oliver to be applied on the note, the judgment of the appellate court is right, provided the note is negotiable and governed by the rules of law applicable to negotiable paper.

By our statute, all promissory notes made by any person, whereby such person promises or agrees to pay any sum of money or article of personal property, or any sum of money in personal property, or acknowledges any sum of money or article of personal property to be due to any other person, are negotiable. If a note is for the payment of money it must be for a fixed sum payable at all events and at a time specified therein or at a time which must certainly arrive. The objections made to this note are, that when read with the mortgage therein referred to it may become payable before the time specified in the note, and, by virtue of the provisions of the mortgage, it secures an uncertain sum for taxes and insurance and secures the holder against acts constituting waste.

¹⁶² Assuming that the note and mortgage are to be construed as one instrument so far as the stipulations of the mortgage may affect the note, the first question is whether a provision that upon a certain contingency the holder shall have the option to declare a note due before the time fixed for its maturity will destroy its negotiability. It is true that the money must be certainly payable, and if it is uncertain whether the money will ever become due the instrument is not a promissory note. Here it is certain that the time would arrive when the note would be payable. It would be due absolutely on March 1, 1894, but upon a certain contingency it might become due earlier. Notes payable at or before a given date are negotiable: 4 Am. & Eng. Ency. of Law, 2d ed., 92. An option of the maker to pay before the date fixed does not affect the negotiability of the note, and it is payable absolutely notwithstanding the option: *Dorsey v. Wolff*, 142 Ill. 589, 34 Am. St. Rep. 99. A note payable by installments is negotiable, although the whole is to become due upon a failure in the payment of an installment or the nonpayment of interest: *Chicago Ry. Equipment Co. v. Merchants' Bank*, 136 U. S. 268. So a note payable at a date certain, or sooner, upon the happening of some specified event, is held to be due at such date and is negotiable; as, for example, a note due at a fixed day, or before, if made out of the sale of certain property or upon making a collection, or in case of the death of the maker before such day: *Harlow v. Boswell*, 15 Ill. 56; *McCarty v. Howell*, 24 Ill. 342; *Cisne v. Chidester*, 85 Ill. 523; *Beatty v. Western College*, 177 Ill. 280, 69 Am. St. Rep. 242. There can be no difference, in principle, between the exercise of an option by the maker to pay before a certain day, or a provision that the notes shall be due upon the happening of some event prior to the date fixed and an option of the holder to declare it due upon the occurrence of some event. The provision for declaring the note due did not affect its negotiability.

¹⁶³ The other proposition, that the stipulations of the mortgage render the amount promised to be paid by the note uncertain, is not correct. The amount is not increased in any event, but the note is to be satisfied by the sum certain therein named. The provisions of the mortgage for the allowance of costs, taxes, assessments, insurance, and attorneys' fees apply only in case of foreclosure and do not add to the amount of the note. The judgment is right, regardless of the finding respecting the agency of Brinkerhoff & Oliver, as well as the

question whether the law would apply the payment on the note when it afterward came to the hands of Brinkerhoff & Oliver. Plaintiff bought it before due and without notice of the payment, and must be protected.

The judgment of the appellate court is affirmed.

ON APPEAL, FINDINGS OF FACT made by the trial court will not be disturbed if there is evidence to justify them: *Devlin v. Quigg*, 44 Minn. 534, 20 Am. St. Rep. 592. Such findings have the force and effect of a verdict of the jury: *Swayne v. Waldo*, 73 Iowa, 749, 5 Am. St. Rep. 712. See, also, *Holker v. Hennessey*, 141 Mo. 527, 64 Am. St. Rep. 524.

NEGOTIABLE INSTRUMENTS.—A PROVISION in a promissory note to the effect that it may, at the holder's option and by reason of the maker's default, become due at a date earlier than that fixed, does not destroy the negotiability of such note: *Merrill v. Hurley*, 6 S. Dak. 592, 55 Am. St. Rep. 859. See, too, *Markey v. Corey*, 108 Mich. 184, 62 Am. St. Rep. 698; *Roads v. Webb*, 91 Me. 406, 64 Am. St. Rep. 246.

NEGOTIABLE INSTRUMENTS.—A STIPULATION in a promissory note to pay all reasonable attorneys' fees in case suit is brought to enforce payment does not destroy its negotiability: *Openheimer v. Bank*, 97 Tenn. 19, 56 Am. St. Rep. 778; *Salisbury v. Stewart*, 15 Utah, 308, 62 Am. St. Rep. 934. Contra, *Roads v. Webb*, 91 Me. 406, 64 Am. St. Rep. 246; *Kendall v. Parker*, 103 Cal. 319, 42 Am. St. Rep. 117.

KIPPING v. DEMINT.

[124 ILLINOIS, 165.]

EXECUTORS AND ADMINISTRATORS—DECREE OF SALE—STATUTE OF LIMITATIONS.—An order for the sale by an executor of a decedent's property for the payment of debts cannot be regarded as a judgment at law or a decree in chancery for the payment of money, but it is a decree in rem, and will remain in force, so that the executor may sell the property, for more than seven years.

F. M. Gauen and Kramer, Creighton & Shaeffer, for the plaintiffs in error.

Winkelmann & Baer, for the defendant in error, William T. Demint.

¹⁶⁵ CARTER, J. Plaintiffs in error brought their bill in the court below for the partition of sixty-five acres of land. The demurrer of defendants in error was sustained and the bill dismissed by the court.

Plaintiffs in error allege that they and certain of the defendants in error are entitled to the land as devisees under the last will of John Duffy, deceased. The bill shows that the executrix, upon her petition duly filed, obtained an order of the county court for the sale of said land to pay the debts of the testator, but did not make any sale under said order until more than seven years had elapsed after the order was entered, when she sold the land at public sale, as directed by the order, and, after her report of sale was approved by the court, conveyed it to defendant in error Demint, the purchaser at the sale. The contention of plaintiffs in error is, that after the lapse of seven years no sale could legally be ^{leg} made under the order; that the sale and conveyance were void, and that the title remained in the devisees. Reference is made to the statute relating to judgments, providing that a judgment of a court of record shall be a lien on the debtor's real estate in the county for seven years and no longer, and that no execution shall issue on any judgment after the expiration of seven years from the time it became a lien. Our attention is also called to sections 44 and 45 of the statute regulating the practice in chancery (Rev. Stats., p. 203), section 44 providing that a decree for money shall be a lien on the land of the party against whom it is entered to the same extent and under the same limitations as a judgment at law, and section 45 providing as follows: "All decrees given in causes in equity in this state shall be a lien on all real estate respecting which such decrees shall be made; and whenever, by any decree, any party to a suit in equity shall be required to perform any act other than the payment of money, or to refrain from performing any act, the court may, in such decree, order that the same shall be a lien upon the real or personal estate, or both, of such party until such decree shall be fully complied with; and such lien shall have the same force and effect, and be subject to the same limitations and restrictions, as judgments at law." We are also referred to many cases in which we have held that a delay of seven years after the grant of letters of administration in presenting to the court a petition to sell the lands of the decedent to pay his debts is such laches as will bar all relief in such a proceeding unless such delay is satisfactorily explained; that the rule is applied, by analogy, to the duration of the lien of judgments and to the time in which, in certain cases, ejectment may be brought, but that no inflexible rule can be laid down applicable to all cases, each case being judged upon its

own merits: *Rosenthal v. Renick*, 44 Ill. 202; *Moore v. Ellsworth*, 51 Ill. 308; *Judd v. Ross*, 146 Ill. 40; *McKean v. Vick*, 108 Ill. 373; *Furlong v. Riley*, 103 Ill. 628; ¹⁸⁷ *Bishop v. O'Conner*, 69 Ill. 431; *Wolf v. Ogden*, 66 Ill. 224; *Bursen v. Goodspeed*, 60 Ill. 277. So, also, it has been held, upon like grounds, that a delay of seven years after the death of the decedent will bar an application for letters of administration unless an earlier application is prevented by circumstances shown: *McCoy v. Morrow*, 18 Ill. 519, 68 Am. Dec. 578; *Fitzgerald v. Glancy*, 49 Ill. 465.

But the case at bar differs from each and all of the cases referred to. Letters testamentary were granted in proper time, and the petition to sell was filed within seven years after such letters were issued, but the delay of seven years was in making the sale after the order of sale was entered. If such an order were regarded as a judgment at law or a decree in chancery for the payment of money, then, by virtue of the statute, no sale could be made under it after the lapse of seven years. Section 101 of the act relating to the administration of estates, even as it then stood before the amendment of 1887, provided that the practice in such cases shall be the same as in chancery: *Harding v. Le Moyne*, 114 Ill. 65. The order or decree of sale cannot be regarded as a judgment at law or a decree in chancery for the payment of money, but it is a decree in rem directing the sale of the land. No execution is required or can be issued to carry the order or decree into effect, but the executor or administrator acts under the decree itself. There is no statute providing that an order or decree directing the sale of real estate shall be barred by the lapse of seven years. In *Kirby v. Runals*, 140 Ill. 289, we held that a decree of sale in a foreclosure suit was not barred by the lapse of seven years, but that the sale could be made after that period had elapsed; that the last clause of section 45 above quoted, applying the same limitations and restrictions to the liens therein mentioned, applied to the second clause of said section 45, and not to the first. That is to say, that whenever, by the decree, a party is required to perform or to refrain from performing an act, ¹⁸⁸ and the decree is made a lien upon the property of such party, such lien will be subject to the same limitations and restrictions as judgments at law, leaving the lien of decrees mentioned in the first clause of said section unaffected by such limitations. It would seem that there is a much closer analogy between a decree for the sale of land to pay debts and a de-

creed of sale in foreclosure than between the former and a judgment at law or a decree for the payment of money. What the reasons for the delay in making the sale were is not disclosed by the bill, but the complainants were defendants to the petition for sale in the county court and filed no exceptions to the report of sale, so far as the record shows. But however this may be, we see no more reason for applying the limitations applicable to liens of judgments and decrees for money to a decree in rem, in a proceeding to sell to pay debts, than to any other decree in rem rendered in a chancery proceeding. In that matter the county court is not a court of inferior or limited jurisdiction. True, it is contended, with great plausibility, that the rule derived from analogous cases and liens at law which this court has applied to limit the time in which letters of administration may be taken out and petitions to sell lands to pay debts may be brought, should also be applied to the order or decree of sale; still, we think the reasons for the rule do not apply, as before said, to a decree of sale after its rendition, which is a decree in rem, but that it will remain in force as long as other decrees of the same character. So holding, there was no error in sustaining the demurrer and dismissing the bill.

Decree affirmed.

Mr. Justice Boggs took no part in the decision of this case.

EXECUTORS AND ADMINISTRATORS—LIMITATION OF ACTIONS.—Though no statute of limitations is applicable, no unreasonable delay, either in administering or in making a sale after administration is taken, is permitted. If it is the policy of the law that seven years should be deemed a sufficient time in which to assert title to land, it ought equally to be regarded as a sufficient time within which a creditor should take measures to have the real estate of a decedent sold to satisfy his demands: *Roth v. Holland*, 56 Ark. 683, 35 Am. St. Rep. 126. See, too, *Brogan v. Brogan*, 63 Ark. 405, 58 Am. St. Rep. 124, and note.

GREENLEAF v. BOARD OF REVIEW OF MORGAN COUNTY.

[184 ILLINOIS, 226.]

CORPORATIONS—PROPERTY AND STOCK.—The tangible property of a corporation and the shares of stock therein are separate and distinct kinds of property and belong to different owners, the first being the property of the artificial person—the corporation—the latter the property of the individual owner.

TAXATION—CORPORATE STOCK—WHERE TAXED.—A share of stock in a corporation is personal property, and is taxable to the owner as other personal property at the place of his residence, whether the corporation is foreign or domestic.

William Brown and Julian P. Lippincott, for the appellant.

E. C. Akin, attorney general, C. A. Hill, and B. D. Monroe, for the appellee.

226 **BOGGS, J.** The appellant, Greenleaf, is a resident of the county of Morgan, in the state of Illinois. On the first day of April, 1899, he owned and had in his possession in this state certain certificates of shares, of the par value of eighty thousand dollars, in a corporation organized under the laws of the state of Kansas, and chartered by the state under the corporate name of "The Greenleaf-Baker Grain Company." The entire capital stock of the corporation was then invested in real estate, grain elevators, grain, and other tangible property, all of which were located in the **227** state of Kansas and were assessed in the state for taxation. He was required by the assessor to list as assessable for taxation in the said county of Morgan the said shares of capital stock in the said corporation. The board of review of the county approved the action of the assessor. This is an appeal from such holding of the board of review, certified to this court by the auditor of public accounts.

It is not contended the certificates of stock, if assessable, should be valued at less than their par value. The argument of counsel for appellant is, the certificates of shares in the capital stock of the corporation are mere tokens or evidence of the owner's relative interest in the tangible property owned by the corporation; that the situs of such tangible property is in the state of Kansas; that it is there properly and lawfully taxed, and that the assessment of the shares of stock for taxation in this state is simply taxing the tangible property a second time.

We need not consider whether it is entirely beyond the power of the state, represented by the general assembly, to impose double taxation upon the same property, for the reason it is well settled the tangible property of a corporation, and the shares of stock therein, are separate and distinct kinds of property and belong to different owners, the first being the property of the artificial person—the corporation—the latter the property of the individual owner thereof: *Danville Banking etc. Co. v. Parks*, 88 Ill. 170; 25 Am. & Eng. Ency. of Law, 662-670; *Desty on Taxation*, 353. The general assembly, representing the sovereignty of the state, has ample inherent power to impose taxes on all property within the state, the only limitations being such as are declared in the constitution of the state or that of the United States: *Porter v. Rockford etc. R. R. Co.*, 76 Ill. 561; 25 Am. & Eng. Ency. of Law, 18, note 11. Neither in the organic law of the general government or in that ²²⁸ of the state is there any prohibition against the imposition of taxes on shares of capital stock of foreign corporations held and owned by residents of this state. A share of stock in a corporation is personal estate, and in the absence of any statute to the contrary is taxable to the owner as other personal estate, at the place of his residence, whether the corporation be foreign or domestic: *Cooley on Taxation*, 2d ed., 22, 23; *Burroughs on Taxation*, 188; *Desty on Taxation*, 353; *Danville Banking etc. Co. v. Parks*, 88 Ill. 170. The authorities are uniform upon the proposition a tax may be lawfully levied on shares in the capital stock of foreign corporations held and owned by a resident of the state which imposes the tax, though the corporation has paid taxes on its capital stock or property under the laws of the state under which the corporation was created: 25 Am. & Eng. Ency. of Law, 664; *Porter v. Rockford etc. R. R. Co.*, 76 Ill. 561. Clause 1 of section 6 of chapter 120 of our statutes entitled "Revenue," requires that shares of stock of any company, when the capital stock of such company is not assessed in this state, shall be listed and assessed for taxation, and clause 29 of section 25 of the same chapter required the appellant to report for taxation the amount and value of the shares of stock in question. It was within the power of the general assembly to require the shares should be so assessed.

The provision of the proviso to clause 4 of section 3 of the said revenue act, that the shares of stock of a domestic corpora-

tion (except banking corporations, etc.), shall not be assessed for taxation if the tangible property or capital stock of the corporation is assessed under our revenue laws, does not affect the question here involved. That provision only operates to relieve shareholders in other than corporations authorized to do business as banks from taxation where the property represented by the shares has borne the burden of contributing to the public revenues of this state. The shares of stock ²²⁰ in the Kansas corporation held and owned by appellant are property within the jurisdiction of this state. They may be the subject of contracts of sale, barter, or exchange under our laws, and the power of our laws may be invoked to enforce or defend such contract, and also to protect the property interest of appellant in them against force, fraud, or theft. He is a resident of the state, and is entitled to invoke the authority of the state and the aid of our courts to protect his property, including these shares of stock. While the legality of a tax cannot be determined by reference to peculiar benefits to the particular property assessed for taxation, that element of natural justice is not lacking in this instance, for the state does and must maintain and provide the machinery and instrumentalities of organized government necessary to secure and protect appellant in the enjoyment of his property rights in these shares of stock, and he may command and employ those sovereign powers for the protection of this identical property. If the stock be not assessed for taxation, he will enjoy the benefits of the organized power of the state for the protection of his property rights and interest therein without being required to contribute to the support of the state government in proportion as he enjoys its advantages and protection. It is no doubt true the tangible property of the corporation bears the burden of contributing to the revenues of the state of Kansas. It there has and needs the protection of the governmental functions of that state; but the appellant's shares of stock are within the jurisdiction of this state, are property here, need and have the protection of our laws, and are legally taxable, as is other property which has its situs within the state.

The action of the board of review is approved and its order is affirmed.

THE TAXATION OF SHARES OF STOCK is not a tax on the capital stock of the corporation, as they represent different property interests, and are distinct subjects of taxation: Common-

wealth v. Charlottesville etc. Co., 90 Va. 790, 44 Am. St. Rep. 950; extended note to Buck v. Miller, 62 Am. St. Rep. 458, 459.

TAXATION.—SHARES OF STOCK in a corporation, like other forms of intangible personal property, are taxable at the domicile of the owner, whether the corporation is foreign or domestic: See extended note to Buck v. Miller, 62 Am. St. Rep. 458.

LANZIT v. SEFTON MANUFACTURING COMPANY.

[184 ILLINOIS, 325.]

CONTRACTS IN GENERAL RESTRAINT OF TRADE are void as being against public policy, but contracts in partial restraint of trade are valid and enforceable, if reasonable and supported by a good consideration.

CONTRACTS—RESTRAINT OF TRADE—REASONABLENESS.—Whether a contract in restraint of trade is reasonable or not under all the circumstances of the case is a question to be determined by the court.

CONTRACTS—RESTRAINT OF TRADE—WHEN UNREASONABLE.—A contract whereby a manufacturer of paper novelties sells his business and covenants not to engage in such business either directly or indirectly anywhere within the borders of two states is unreasonable and against public policy, where such manufacturer is a resident of one of the states and it does not appear that the restraint was necessary to protect the buyer, since the public is deprived of his industry and he himself is precluded from pursuing his occupation.

Samuel J. Howe, for the appellant.

Church, McMurdy & Sherman, for the appellee.

³²⁷ **CARTER, J.** Upon its bill in equity brought in the superior court of Cook county, appellee obtained a decree enjoining appellant, for a period of ten years from February 3, 1897, from following or engaging in, directly or indirectly, in any capacity whatever, the business of manufacturing, selling, handling, or dealing in paper receptacles, oyster pails, paper clothing boxes, folding paper boxes, or paper novelties of any kind or description whatever, and from furnishing any person, firm, or corporation with any information relating to or concerning any of said business, in the states of Illinois and Indiana, and each of them, and from continuing in the employment of the Fred Bentz Paper Company, and from dealing in said goods in connection with said company in said two states, and each ³²⁸ of them. The bill and decree were based upon the following contract between appellant and appellee:

"Chicago, Ill., February 3, 1897.

"As a special consideration for the purchase this day by the J. W. Sefton Manufacturing Company, an Indiana corporation (doing business, also, in Chicago), from me of my share and interest in and to the said business heretofore conducted by myself and Mrs. Margaret Banks at Chicago, Illinois, under the firm name and style of Joseph J. Lanzit Manufacturing Company, in accordance with the terms of a certain bill of sale made at Chicago, Illinois, this day, and as a special consideration for the employment of me by said J. W. Sefton Manufacturing Company as a salesman, in accordance with a certain contract of employment made at Chicago this day, and for one dollar and other good and valuable considerations, the receipt whereof I hereby acknowledge, I, Joseph J. Lanzit, of Chicago, Illinois, do hereby expressly covenant and agree as follows: That for the period of ten years from this third day of February, 1897, I will not anywhere in the United States of America, directly or indirectly, either alone or with any other person, firm, or corporation, as employé, stockholder, officer, manager, or otherwise, or in an advisory capacity, set up, follow, or engage in the business of manufacturing, buying, selling, handling or dealing in paper receptacles, paper oyster pails, clothing boxes, folding paper boxes, or paper novelties of any kind or description whatsoever, nor will I furnish any other person, firm, or corporation with any information relating to or concerning any of said business."

Then follows a paragraph identical with the last, except that the territory named, instead of the United States of America, is the state of Indiana, and this in turn is followed by a paragraph in which the territory named is the state of Illinois, and it by a paragraph in which the territory named is Cook county, Illinois, after which is the following:

"All the above restrictions are subject to the exceptions of my employment with the said J. W. Sefton Manufacturing Company, as per said contract of employment this date.

"In witness whereof I have hereunto set my hand and seal at Chicago, Illinois, this third day of February, A. D. 1897.

"JOS. J. LANZIT. [Seal]

"Fred W. Job, Witness."

³²⁹ The evidence shows that after Lanzit's term of employment, which was one year, had expired, he was employed by said Rentz Paper Company, engaged, in part, in the same busi-

ness in Illinois and Indiana as that carried on by appellee and covered by the contract in question. But there is no allegation that said business was carried on in Cook county, or that appellant was engaged in any business covered by his contract, in Cook county.

The only question for consideration is, Were those provisions of the contract by which appellant agreed not to engage for ten years in said business in Illinois, Indiana and the United States, void because in restraint of trade? As drawn, the contract is severable, and may, if within the scope of the bill, be enforced as to any valid provision of it as to the territory therein mentioned, and declared void as to other provisions found invalid.

The bill alleged and the proof showed that appellee was an Indiana corporation, but authorized to do, and was doing, business in this state as well as in Indiana; that it manufactured and sold its goods mentioned in the contract in both states, and transacted its business, to a great extent, from its office in Chicago, and the prayer of the bill was that appellant be enjoined from violating his contract as to the states of Indiana and Illinois. It is too well settled to require discussion that contracts in general restraint of trade are void as being against public policy. But contracts only in partial restraint of trade are valid and enforceable, if reasonable and supported by a consideration good in law: *Linn v. Sigsbee*, 67 Ill. 75; *Hursen v. Gavin*, 162 Ill. 377, and cases there cited. In *Hursen v. Gavin*, 162 Ill. 380, we said: "A contract in restraint of trade is thus total and general when by it a party binds himself not to carry on his trade or business at all, or not to pursue it within the limits of a particular country or state. Such a general contract in restraint of trade necessarily works an injury to the public at large and to the party himself in the respects indicated, ³³⁰ and is therefore against public policy": See, also, *Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189; *Wright v. Ryder*, 36 Cal. 342, 95 Am. Dec. 186.

It is said, however, by appellee that what was said in the *Hursen* case was not necessary to the decision, and should not be regarded as authority in a case where the question is directly involved. It is also argued that the strictness of the rule laid down in the early cases has been greatly relaxed because of the different methods and increased facilities of communication and of transacting business, enabling the merchant or manufacturer to extend his trade over greater areas of territory than formerly was possible. Many cases are cited, among them *Gibbs v. Balti-*

more Gas Co., 130 U. S. 409, *Tode v. Gross*, 127 N. Y. 485, 24 Am. St. Rep. 475, *Diamond Match Co. v. Roeber*, 106 N. Y. 477, 60 Am. Rep. 464, *Hodge v. Sloan*, 107 N. Y. 248, 1 Am. St. Rep. 816, *Leslie v. Lorillard*, 110 N. Y. 534, and *Cowan v. Fairbrother*, 118 N. C. 406, 54 Am. St. Rep. 733. But all of these cases fully recognize the rule that the contract must be reasonable under all the circumstances of the case and not in general restraint of trade, and that whether it is so or not is a question to be determined by the court. Thus, in *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, while the contract there involved was by a divided court held valid, it was said in the opinion of the court that it has generally been held that a contract not to exercise a trade in a particular state is invalid under the rule, on the ground that it would compel a man thus bound to transfer his residence and allegiance to another state in order to pursue his avocation, but that in this country such a mode of applying the rule should be received with caution. And it was there, and also in *Gibbs v. Baltimore Gas Co.*, 130 U. S. 409, further said: "Cases must be judged according to their circumstances, and can only be rightly judged when the reason and grounds of the rule are carefully considered. There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is, the ³⁵¹ injury to the public by being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases, and the party is deprived of his occupation or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objection is clearly against public policy."

The question is here presented whether said contract between appellant and appellee is or not reasonable and consistent with the public policy of the state. The record shows that appellant was, at the time of the making of the contract, engaged in said business in this state, and that after his term of employment by appellee ended he became employed by the *Rentz* company, engaged in this state in part in the same business. The effect of the contract, if enforced as decreed below, would be to deprive the public—the people of the whole state—of the industry

and skill of appellant in the particular trade or business in which he may be most skillful and useful, and compel him to engage in some other business or move to another state in order to support himself and family—in other words, to expatriate himself so far as his citizenship of this state extends and go beyond our jurisdiction. Whether or not, under certain facts and circumstances, a valid contract might not be entered into not to engage in a specified business within the state it is not necessary here to determine. As said above, “cases must be judged by the circumstances.” But we are of the opinion that a contract of the character and tending to produce the effect of the one under consideration is, under all of the circumstances shown, unreasonable and against the public policy of this state: *Allbright v. Teas*, 37 N. J. Eq. 171; *Consumers’ Oil Co. v. Nunnemaker*, 142 Ind. 560, 51 Am. St. Rep. 193; *Berlin* ³³² *Machine Works v. Perry*, 71 Wis. 495, 5 Am. St. Rep. 236; *Holmes v. Martin*, 10 Ga. 503; *Lange v. Werk*, 2 Ohio St. 519; *Keeler v. Taylor*, 53 Pa. St. 467, 91 Am. Dec. 221; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 8 Am. Rep. 159. For the period of ten years the restraint is total, when considered with reference to the limits of the state and so far as our laws and the jurisdiction of our courts extend. Besides, business and trade in this country are not usually affected by state lines, and there is nothing in this case to make it appear that the boundaries of this state or of the state of Indiana, or of both of them combined, are the reasonable boundaries of the territory covered, or intended to be covered, by the business or trade mentioned in the contract and necessary for the protection of appellee in its purchase from and contract with appellant. In the *Hursen* case we said: “Where the restriction embraces too large a territory it will be unreasonable and void, as being wider than is necessary for the protection of the party in whose favor it is imposed.” True, cases may arise—have arisen—where it would appear that even a greater extent of territory than a single state would not be wider than necessary for the protection of the covenantee from the competition intended to be guarded against. But this is not the only test of the validity of the contract. The interest and welfare of the public are of paramount importance. If a contract is in restraint of trade throughout an entire state it may be void as against public policy, although it may appear not to be unreasonable when considered merely with reference to the extent of the business of the covenantee and the protection intended

to be secured to him. If such were not the rule, then the mere magnitude of the business and trade involved in the contract would determine its validity, overriding all questions affecting the public welfare.

The decree enjoining appellant from engaging in said business in the states of Illinois and Indiana is erroneous and should have been reversed by the appellate court. ³³³ Whether so much of the contract as applies to Cook county only might not be enforced it is unnecessary to determine, as there are no allegations in the bill to sustain such a decree.

The judgment of the appellate court is reversed and the cause remanded.

CONTRACTS IN GENERAL RESTRAINT OF TRADE are void, but those in partial restraint, if founded upon a valuable consideration and reasonable in their operation, are valid: *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177; *Lufkin Rule Co. v. Fringell*, 57 Ohio St. 596, 63 Am. St. Rep. 736, and note.

CONTRACTS—RESTRAINT OF TRADE.—An agreement entered into at the time a business with the goodwill thereof is sold, not to engage in the same business in the same state for a period of twenty-five years is in general restraint of trade and void: *Lufkin Rule Co. v. Fringell*, 57 Ohio St. 596, 63 Am. St. Rep. 736. So, too, is an agreement not to carry on a business for five years without limitation as to space: *Bishop v. Palmer*, 146 Mass. 469, 4 Am. St. Rep. 339.

THE RESTRAINT OF TRADE involved in the sale of a business will be sustained only so far as appears to be a reasonable space of interdicted territory, and what is a reasonable limit is a question of law for the court: *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560, 51 Am. St. Rep. 193.

ALLAIRE v. ST. LUKE'S HOSPITAL.

[184 ILLINOIS, 359.]

NEGLIGENCE—ACTION FOR INJURIES BEFORE BIRTH.—A child before birth is, in fact, a part of the mother, and while an unborn child is regarded as in being for some purposes, it is not such a distinct being as will permit of an action by it to recover for injuries occasioned before its birth.

Action by an infant by his next friend to recover for personal injuries received by him before birth by reason of the defendant's negligence. The plaintiff's mother had gone to the defendant hospital to be under the care of its attendants about ten days before the plaintiff's birth. She was taken up in the hospital building in an elevator, which was open, and by reason

of which fact and of the improper position of the chair in which she had been placed, the chair struck a projection and she was thrown to the side of the elevator and sustained severe injuries, and the plaintiff sustained severe injuries also. A demurrer to the complaint was sustained.

Philetus Smith, for the appellant.

Lynden Evans, for the appellees.

³⁸⁵ **PER CURIAM.** In deciding this case the appellate court delivered the following opinion:

"The action is not given by any statute, and if maintainable it must be so by the common law, and, therefore, the question is whether, at common law, the action can be maintained. Had the plaintiff, at the time of the alleged injury, in contemplation of the common law, such distinct and independent existence that he may maintain the action, or was he, in view of the common law, a part of his mother? If the former, it would seem the action can be maintained; but if the latter, not, because, if a part of his mother, the injury was to her and not to the plaintiff.

"Appellant's counsel has argued the case learnedly and with not a little industry, but has cited only two cases in which it was attempted to maintain actions involving the question presented here—namely, *Dietrich v. Northampton*, 138 Mass. 14, 52 Am. Rep. 242 (decided in 1884), and *Walker v. Great Northern Ry. Co.*, 28 L. R. Ir. 69 (decided in 1891). In the former case the facts were, that the mother, when advanced four or five months in pregnancy, slipped and fell by reason of a defect in the highway, the consequence of which was a miscarriage. The plaintiff was ³⁰⁶ alive when delivered, but was too little advanced in foetal life to survive its premature birth. The action was brought by the administrator of the deceased infant under a statute authorizing an action for the benefit of the mother or next of kin. The trial and supreme courts both held that the action could not be maintained, the latter court saying: 'Taking all of the foregoing considerations into account, and, further, that as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate, within its meaning.'

"In *Walker v. Great Northern Ry. Co.*, 28 L. R. Ir. 69, the statement of claim was, substantially, that Annie Walker, mother of the plaintiff, while quick with child, became a passenger on the defendant's railway and was so received by the defendant, and that the defendant so carelessly and negligently conducted itself in carrying said Annie Walker and in managing its railway, that the plaintiff was thereby injured, crippled, and deformed. A demurrer was sustained to the statement of claim, all the judges concurring in the opinion that it was defective in not showing a contractual relation between the plaintiff and the railway company, but merely averring a contract between the mother of the plaintiff and the company. The question, however, whether such an action could be maintained by an infant in its mother's womb at the time of the alleged injury could under any circumstances be maintained was discussed elaborately and with great learning both by court and counsel. O'Brien, C. J., after discussing the question, expressly declined to commit himself by an opinion, leaving it, as he said, 'an open question,' so far as he was concerned. Harrison, J., while basing his decision on the insufficiency of the statement of claim, says in his opinion: 'When the accident occurred on the 12th of June the plaintiff was still unborn ³⁶⁷ and had no existence apart from her mother, who was the only person whom the defendants contracted to carry on their line,' etc. Johnson, J., in his opinion says: 'As a matter of fact, when the act of negligence occurred the plaintiff was not in esse—was not a person or a passenger or a human being. Her age and her existence are reckoned from her birth, and no precedent has been found for this action.' Again, commenting on the claim of liability, the same learned judge says: 'If it did not spring out of contract, it must, I apprehend, have arisen, if at all, from the relative situation and circumstances of the defendant and plaintiff at the time of the occurrence of the act of negligence. But at that time the plaintiff had no actual existence—was not a human being and was not a passenger in fact; as Lord Coke says, the plaintiff was then *pars viscerum matris*, and we have not been referred to any authority or principle to show that a legal duty has ever been held to arise toward that which was not in esse in fact and has only a fictitious existence in law, so as to render a negligent act a breach of duty.' O'Brien, associate judge, in his opinion says of the action: 'It is admitted that such a thing was never heard of before, and yet the circumstances which would give rise to such a claim must

at one time or another have existed.' In *Dietrich v. Northampton*, 138 Mass. 14, 52 Am. Rep. 242, the court says: 'But no case, so far as we know, has ever decided that if the infant survived it could maintain an action for injuries received by it while in its mother's womb.'

"Appellant's counsel substantially admits that there is no precedent for the action. While it is true that this is not conclusive that the action may not be maintained, yet, in view of the fact that, as said by Mr. Associate Justice O'Brien, similar circumstances must have before occurred, it is entitled to great weight, especially when the right to maintain the action is, to say the least, doubtful. Mr. Associate Justice O'Brien, in *Walker v. Great Northern Ry. Co.*, 28 L. R. Ir. 69, says: "The law is, in some respects, a stream, ³⁶⁸ that gathers accretions, with time, from new relations and conditions. But it is also a landmark that forbids advance on defined rights and engagements; and if these are to be altered—if new rights and engagements are to be created—that is the province of legislation and not decision.' In this we fully concur. That a child before birth is, in fact, a part of the mother and is only severed from her at birth cannot, we think, be successfully disputed. The doctrine of the civil law and the ecclesiastical and admiralty courts, therefore, that an unborn child may be regarded as in esse for some purposes, when for its benefit, is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth. If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it. We are of opinion that the action will not lie. The judgment will be affirmed."

We concur in the foregoing views, and in the conclusion reached by the appellate court. Accordingly, the judgment of the appellate court is affirmed.

MR. JUSTICE BOGGS dissented from the opinion of the court, and while admitting that such a case had never arisen before, denied that the common law was without power to act in such a case even in the absence of precedents. Continuing, the justice said: "A foetus in the womb of the mother may well be regarded as but a part of the bowels of the mother during a portion of the period of gestation; but if, while in the womb, it reaches that prenatal age of viability when the destruction of the life of the mother does not

necessarily end its existence also, and when, if separated prematurely and by artificial means from the mother, it would be so far a matured human being as that it would live and grow, mentally and physically, as other children generally, it is but to deny a palpable fact to argue there is but one life, and that the life of the mother. Medical science and skill and experience have demonstrated that at a period of gestation in advance of the period of parturition the foetus is capable of independent and separate life, and that though within the body of the mother it is not merely a part of her body, for her body may die in all of its parts and the child remain alive and capable of maintaining life when separated from the dead body of the mother. If at that period a child so advanced is injured in its limbs or members and is born into the living world suffering from the effects of the injury, is it not sacrificing truth to a mere theoretical abstraction to say the injury was not to the child but wholly to the mother? . . . If, in the contemplation of the common law, life begins as soon as the infant is able to stir in the mother's womb, and that an injury inflicted upon an infant while in the womb of the mother shall be deemed murder if the infant survive the wound during prenatal life but succumbs to it and dies from it after being born, and if every legitimate infant *en ventre sa mere* is to be deemed as born for all purposes beneficial to the child, why should it be supposed the common law would have denied to an infant born alive the right to recover damages for the injury inflicted upon it while in the womb of the mother? Had such injury, though inflicted on the child while in the mother's womb, been sufficient to cause the death of the infant after it had been born alive, the common law would have regarded the injury as having been inflicted upon a human being, and punished the perpetrator accordingly; and that being true, why should the infant which survives be denied the right to recover damages occasioned by the same injury? . . . Should compensation for his injuries be denied on a mere theory, known to be false, that the injury was not to his person but to the person of the mother? The law should, it seems to me, be, that whenever a child in utero is so far advanced in prenatal age as that, should parturition by natural or artificial means occur at such age, such child could and would live separable from the mother and grow into the ordinary activities of life, and is afterward born and becomes a living human being, such child has a right of action for any injuries wantonly or negligently inflicted upon his or her person at such age of viability, though then in the womb of the mother."

ACTION FOR DEATH OF PREMATURE CHILD.—If a woman four or five months pregnant falls on a defective highway and is delivered of a child that survives but a few minutes, the child is not a "person" within the statute giving a cause of action for negligent death to the administrator: *Dietrich v. Northampton*, 133 Mass. 14, 52 Am. Rep. 242.

MARSHALL v. GROSSE CLOTHING COMPANY.

[104 ILLINOIS, 421.]

LANDLORD AND TENANT—ACTION FOR RENT—BAR.—

Where a lease provides for the payment of rent in separate installments, separate actions may be brought on the lease for each installment, and a judgment for one installment of rent is no bar to a second action to recover for a subsequent installment.

LANDLORD AND TENANT—WHAT NOT AN EVICTION.—

Where a tenant abandons premises without the fault of the landlord, the landlord may re-enter and re-rent the premises, and his so taking possession is not an eviction and does not relieve the tenant from the liability for rent.

LANDLORD AND TENANT—EVICTION AS A DEFENSE—

RES JUDICATA.—An alleged eviction cannot be set up as a defense in a second suit for the recovery of rent, where the acts constituting the eviction were known to the tenant before the trial of the first suit, and could have been raised and determined under the issues in that suit.

APPEAL—WHAT CONSIDERED—COURT EXAMINING

WITNESS.—If no objection is made at the trial to the action of the court in examining witnesses, to the exclusion of counsel, no question in regard to such action can be raised on appeal.

TRIAL—DIRECTING VERDICT.—It is proper for the court

to direct a verdict for the plaintiff where there is no conflict in the evidence establishing the plaintiff's right of recovery, and there is no evidence tending to support any defense of the defendant.

Stephen G. Swisher and Dennis & Rigby, for the appellant.

Jerome Probst, for the appellee.

423 CRAIG, J. Three grounds are relied upon by appellant to reverse the judgment of the appellate court: 1. That the former judgment in the circuit court is a bar to this action; 2. That, even aside from such bar, the defendant produced evidence of an eviction, on which he was entitled to go to the jury; and 3. That the court erred in his manner of examining the witnesses, and particularly the appellant; in peremptorily concluding the case and instructing the jury to find for the plaintiff and assess its damages at an amount named by the court, and refusing all instructions requested by the defendant.

Upon an examination of the record it will be found that the former suit was for rent from September 1, 1896, to April 30, 1897, whereas the present action is for the rent accruing subsequent to that time, to wit, from May 1, 1897, to January 31, 1898. It may be conceded that a single cause of action cannot be split into two or more parts and separate suits be brought for the different parts of what, in fact, constitutes a single de-

mand; but, as said by counsel in their argument, "the bare fact that two causes of action spring out of the same contract does not ipso facto render a judgment on one a bar to a suit on the other." The same contract may, and often does, contain independent provisions for the payment of money at different times and in different amounts, and ⁴²⁴ suits may be maintained on each provision of the contract as the payments mature by the terms of the contract. In *McDole v. McDole*, 106 Ill. 452, it was expressly held that where a lease provides for the payment of a given sum annually, separate actions may be brought upon the lease for each year's rent, and a judgment for one year's rent is no bar to a second action for the rent of a subsequent year. So in *Casselberry v. Forquer*, 27 Ill. 170, it was held that where several payments reserved by a lease were due, suit might be brought on each payment successively, as they fall due: See, also, 1 Ency. of Pl. & Pr. 154. It is true that there the two suits were between the same parties and on the same lease, but they were not for the same cause of action, and hence the former suit is no bar to the present action.

It is also claimed that after appellant abandoned the leased premises, acts of appellee in taking possession and renting a portion of the premises, and in making alterations in the hallway and one of the rooms, constituted an eviction, and upon that ground appellee could not recover. There are two answers to this position. In the first place, the premises were abandoned by the appellant without the fault of appellee, and when such is the case the landlord may re-enter and re-rent the premises, crediting the former tenant with the proceeds, and his so taking possession does not relieve the tenant from liability for the stipulated rent: *Humiston v. Wheeler*, 175 Ill. 514. Second, it appears from the record that the vacation of the premises by appellant, the re-entry by appellee, and the alterations to the premises set up as a defense were prior to the commencement of the former suit, and the judgment in the former suit is conclusive on appellant as to all questions concerning the validity of the lease which were or might have been raised and determined under the issues in the former suit, as held in *Louisville etc. Ry. Co. v. Carson*, 169 Ill. 247. Appellant, however, seeks to avoid ⁴²⁵ the effect of the former judgment by the claim that he did not learn of the alterations until after the former trial. The premises were vacated by appellant in August, 1896; the alterations were made in January, 1897; the first suit was commenced April 20, 1897; appellant learned of the alterations

in May or June, 1897, and the first or former suit was tried in November, 1897. This shows appellant knew of the alleged defenses about five months before the former trial.

Under the third ground relied upon for a reversal of the judgment, it is claimed that the court took upon itself the examination of witnesses to the exclusion of counsel. In the trial of a cause the attorneys have the undoubted right to examine their witnesses, and the court has no authority to prevent counsel from exercising that right on the trial of a case. But no objection was made to the action of the court in the examination of witnesses nor was any exception reserved, hence no question is presented for our determination in regard to the action of the court.

It is also said the court terminated the trial before counsel for the defense had rested their case and before the testimony for the defense was all in. The record fails to show that the defendants offered other or further evidence, and in the absence of such a showing it will be presumed that the evidence was all in.

It is also claimed that the court erred in instructing the jury to find a verdict for the plaintiff. As there was no conflict in the evidence, it was a question of law whether, on the facts, plaintiff was entitled to a verdict, and as there was no evidence tending to support any defense interposed by appellant, the court properly instructed the jury to return a verdict for the plaintiff: *Rack v. Chicago City Ry. Co.*, 173 Ill. 289; *Angus v. Chicago Trust etc. Bank*, 170 Ill. 298.

The judgment of the appellate court will be affirmed.

LANDLORD AND TENANT—EVICTION.—Entry by the landlord upon the demised premises followed by a lease to other parties constitutes an eviction: *Note to Keating v. Springer*, 37 Am. St. Rep. 185; but when a tenant wrongfully abandons the premises, the landlord may re-enter without waiving his rights (*Bowen v. Clarke*, 22 Or. 566, 29 Am. St. Rep. 625) and relet the property without surrendering or terminating the first lease: *Respini v. Porta*, 89 Cal. 464, 23 Am. St. Rep. 488.

CONTRACTS—SEPARATE RECOVERY OF INSTALLMENTS DUE ON.—Each default in the payment of money falling due by a contract, payable in installments, may be the subject of an independent action, provided it is brought before the next installment becomes due: *Lorillard v. Clyde*, 122 N. Y. 41, 19 Am. St. Rep. 470, and note.

JUDGMENTS—RES JUDICATA.—A judgment is conclusive, not only as to every matter which was actually litigated, but as to any matter which might have been litigated: *Note to Lorillard v. Clyde*, 19 Am. St. Rep. 474. See this case, 122 N. Y. 41, 19 Am. St. Rep. 470, for the doctrine of *res judicata* as applied when several actions are brought to recover installments.

TRIAL—DIRECTING VERDICT.—If the evidence leaves the facts undisputed, and only one conclusion or inference can reasonably be drawn, the court commits no error in directing a verdict: *McCormick etc. Co. v. Faulkner*, 7 S. Dak. 363, 58 Am. St. Rep. 839, and note.

INTER-OCEAN PUBLISHING COMPANY v. ASSOCIATED PRESS.

[124 ILLINOIS, 438.]

CORPORATIONS—CHARACTER—HOW DETERMINED.—THE UNUSED POWERS of a corporation, as the power to purchase, erect, lease, or sell telegraph and telephone lines, are important in determining the character of a corporation under its charter.

TELEGRAPH COMPANIES—PUBLIC BUSINESS.—The business of a telegraph or telephone company is public in its nature, and a public interest is impressed thereon to such an extent that no discrimination can be made against persons or corporations in its business of receiving and transmitting messages.

CORPORATIONS—NEWS—ASSOCIATED PRESS—PUBLIC USE.—A corporation known as the Associated Press, organized for the sole purpose of gathering news for sale and publication, has devoted its property to a public use, and it can make no discrimination against persons who wish to purchase information and news, for the purposes of publication, which it was created to furnish.

CORPORATIONS—PUBLIC DUTIES—CONTRACT.—The obligation to serve the public, of a corporation whose business is impressed with a public use, is not one resting on contract, but grows out of the fact that it is in the discharge of a public duty, and this duty cannot be disregarded by a contract stipulation that it should not be liable to discharge such public duty.

MONOPOLY.—RESTRICTIONS OF THE ASSOCIATED PRESS. through its by-laws and contracts, whereby its members are prevented from procuring news for publication from any other source than itself, tend to create a monopoly, and are illegal and void.

INJUNCTION AGAINST NEWS ASSOCIATION.—An injunction will issue to restrain the Associated Press, a news association, from refusing to furnish news to one of its members in accordance with the terms of a contract, where the only ground for refusal is the violation by the member of an illegal provision in the contract that he would not procure news from antagonistic agencies.

Knight & Brown, for the appellant.

John P. Wilson and T. A. Moran, for the appellee.

442 **PHILLIPS, J.** The Inter-Ocean Publishing Company, a corporation organized under the laws of the state of Illinois, is engaged in publishing two newspapers in the city of Chicago, known as "The Daily Inter-Ocean" and "The Weekly Inter-

Ocean," which have a wide circulation in the states and territories of the United States. The Associated Press is a corporation organized under the laws of the state of Illinois in 1892. The object of its creation was, "to buy, gather, and accumulate information and news; to vend, supply, distribute, and publish the same; to purchase, erect, lease, operate, and sell telegraph and telephone lines and other means of transmitting news; to publish periodicals; to make and deal in periodicals and other goods, wares, and merchandise." It has about eighteen by-laws, with about seventy-five subdivisions thereof. The stockholders of the Associated Press are the proprietors of newspapers, and the only business of the corporation is that enunciated in its charter, and is mainly buying, gathering, and accumulating news and furnishing the same to persons and corporations who have entered into contract therefor. It may furnish news ⁴⁴³ to persons and corporations other than those who are its stockholders, and the term "members," used in its by-laws, applies to proprietors of newspapers, other than its stockholders, who have entered into contracts with it for procuring news. It does not appear that it has availed itself of any of the powers conferred by its charter other than that of gathering news and distributing the same to its members. Under the by-laws of appellee the Inter-Ocean Publishing Company became a stockholder. Among the by-laws having reference to stockholders are the following:

"Article 11.—Sec. 8. Sale or Purchase of Specials.—No member shall furnish, or permit anyone to furnish, its special or other news to, or shall receive news from, any person, firm, or corporation which shall have been declared by the board of directors or the stockholders to be antagonistic to the association; and no member shall furnish news to any other person, firm, or corporation engaged in the business of collecting or transmitting news, except with the written consent of the board of directors."

"Article 14.—Sec. 1. Board may Suspend.—The board of directors shall have the power, by a two-thirds vote of the whole board, to suspend a member or impose upon him a fine of not exceeding one thousand dollars for furnishing news to any person or association antagonistic or in opposition to the Associated Press, or for purchasing news from any person or organization formally declared by the board of directors or by the stockholders of the association, at any annual or special meeting, to be in such antagonism or opposition, or for any other violation of

the by-laws or his contract; provided, always, that ten days' notice, in writing, of a complaint be first served upon the offending member; and said member shall have an opportunity to be heard in his own defense, and if said member shows that the offense was unintentional, and shall have discontinued the same, he shall not be suspended."

⁴⁴⁴ On March 2, 1893, the Associated Press entered into an agreement with the Inter-Ocean Publishing Company, by which it sold to the latter its night news report for publication in the two newspapers for the term of ninety-two years, which the Inter-Ocean company agreed to receive and pay for at the rate of one hundred and two dollars per week, which sum was liable to be increased fifty per cent. The Associated Press agreed to furnish to the Inter-Ocean company local and telegraphic news within a radius of sixty miles of Chicago, in accordance with its by-laws. The contract between the Inter-Ocean company and the Associated Press, among other provisions, contained the following:

"Sixth. Said party of the second part covenants and agrees that it will not furnish, before publication, any news to any person or corporation engaged in the business of collecting or transmitting news, except upon the written consent of the board of directors of the party of the first part first had and obtained; and that it will not furnish to any person any of the news received by it under this contract before publication by it; and that it will not furnish its special or other news to or receive news from any person or corporation which shall have been declared by the board of directors of said party of the first part antagonistic to said party of the first part, after having received notice of such declaration.

"Seventh. It is further mutually agreed between the parties hereto that the rights, duties, and obligations of the respective parties hereto, except as hereinbefore specifically provided for, shall be controlled and governed by the by-laws of said party of the first part now or hereafter in force, during the life of this contract; and that the right to receive news under this contract may be suspended or terminated in the manner and for the causes specified in said by-laws."

"Ninth. Said party of the first part promises and agrees not to furnish any news report to any newspaper published in the said territory described in this contract ⁴⁴⁵ not now entitled to receive the same under the by-laws of said party of the first part, without the written consent of the said party of the second part or its assigns.

"Tenth. Said party of the second part has assigned and transferred its stock in the said party of the first part to the said party of the first part, which stock is to be held by said party of the first part as security for the performance by said party of the second part of this contract on its part. Said party of the second part, in consideration of the making of this contract by said party of the first part, hereby covenants and agrees that it will not sell or part with any interest in said stock to any party who shall not be the proprietor of a newspaper which shall at the time be on the membership roll of said party of the first part, and that it will keep and observe and perform all the requirements of the by-laws of said party of the first part now or hereafter in force during the life of this contract."

Contracts of substantially the same character have been entered into from time to time between the Associated Press and most of the leading newspapers throughout the United States, to whom under its charter and by-laws and under its contracts, it sells and vends its news. Similar associations for gathering and selling and vending news, to a limited extent, exist in other cities than Chicago, but none of them so widely extended. Among these are the Sun Printing and Publishing Association of New York City, the "New York Sun" of New York City, and the Laffan News Bureau of New York City. These three latter associations have been declared to be antagonistic to the Associated Press by the board of directors of the latter. News of an important character not gathered by the Associated Press was gathered by a certain alleged antagonistic association, and the Inter-Ocean Publishing Company, for the purpose of furnishing its readers with information and news gathered from various points and sources, in addition to the news purchased ~~440~~ by it from the Associated Press also purchased and published news obtained by it from the Sun Printing and Publishing Association of New York City, but did not furnish news to the latter association or to any of the associations antagonistic to the Associated Press. The Chicago Herald Company and the Chicago Daily News Company made complaint to the Associated Press that the Inter-Ocean Publishing Company was publishing news procured by it from the Sun Printing and Publishing Association of New York, the "New York Sun" of New York City and the Laffan News Bureau of New York City, and asked that the Inter-Ocean Publishing Company's contract and *section 8 of article 11* of the by-laws should be enforced. The Associated Press gave notice to the Inter-Ocean Publishing

Company that a meeting of its board of directors would be held at a time and place mentioned, to take action on the complaints of the Chicago Herald Company and the Chicago Daily News Company. Before the time set for hearing the Inter-Ocean Publishing Company filed its bill for an injunction against the Associated Press from suspending or expelling it from its membership and from refusing to furnish it news according to the terms of its contract, and from doing any act or thing tending to deprive it of the news gathered by appellee, and for such other relief, general and special, as might be just and equitable.

The bill set up the facts hereinbefore stated, and set out the by-laws of the appellee in full, and alleged that the appellee had been able to control the business of buying and accumulating news in Chicago and selling the same, and has thus created in itself an exclusive monopoly in that business, and to preserve such monopoly had declared the Sun Printing and Publishing Association a rival or competitor in business and antagonistic to it, and sought to prohibit its members from buying news therefrom under pain of suspension or expulsion; alleged that appellee had at various times, by threats of suspension ⁴⁴⁷ and expulsion, compelled divers of its members to cease buying the special news of the Sun Printing and Publishing Association under its contracts with its members. The bill set out the contracts and names of such members, and alleged that the notice served on appellant for a hearing on the complaints against it is similar to the action of appellee against other members who were forced to cease buying special news from the Sun Printing and Publishing Association; that appellant is in duty bound, both to its patrons and to the public, to publish all the news it can gather, and, if not able to obtain such news from one source, it must, in justice to its patrons and the public, resort to other sources; that the news which it obtained from appellee it was unable to obtain from any other source, and appellee would not furnish the same to appellant unless it executed the contract hereinbefore mentioned, because of which appellant was forced to and did execute such contract; that appellee does not furnish all the news obtainable and desired by appellant under that contract, and to obtain such other news appellant was forced to resort to the Sun Printing and Publishing Association of New York; that the right to receive the news gathered by appellee and publish the same in its newspaper is a valuable property and property right, and appellant is forced to obtain the news not obtainable from appellee, and which is ab-

olutely needed in publishing its newspapers, from the Sun Printing and Publishing Association; that the appellee is attempting to force appellant to cease taking news from the latter association, but to do so would work irreparable damage and injury to appellant, and would prevent it from furnishing needed, important, and necessary news to the public, and would tend to create in favor of appellee a monopoly.

The appellee filed an answer to the bill. A hearing was had upon the bill and answer, both of which were sworn to, and certain affidavits which were read and used ⁴⁴⁸ as depositions, and a decree was rendered dismissing the bill for want of equity. On appeal to the appellate court for the first district the decree was affirmed, and this appeal is prosecuted.

It has been uniformly held that a telegraph or telephone company is bound to treat all persons and corporations alike, and without discrimination in its business of receiving and transmitting messages. The business of such a company is public in its nature, and a public interest is impressed thereon to such an extent that no discrimination can be made against persons or corporations: *People v. Western Union Tel. Co.*, 166 Ill. 15. Where one is the owner of property which is devoted to a use in which the public has an interest, he, in effect, grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good as long as such use is maintained. The manner in which it is devoted to a use in which the public has an interest may be very diverse and the public interest in such use may be of a widely variant character; but where the use is one in which the public is interested or has an interest, public control is necessary for the common good: *Munn v. People*, 94 U. S. 113. The appellee corporation voluntarily sought corporate existence to engage in an enterprise which invested it with, among others, the power of eminent domain. It was organized, among other things, to purchase, erect, lease, operate, and sell telegraph and telephone lines—a business which is essentially public in its nature and renders a corporation so engaged amenable to public control. Whilst, under the averments of the bill and answer and affidavits, the appellee corporation has only engaged in business to the extent of its power “to buy, gather, and accumulate information and news, to vend, supply, distribute, and publish the same,” and has not attempted to purchase, erect, lease, or sell telegraph and telephone lines, it is important

to determine the character ⁴⁴⁹ of the corporation under its charter and under the business in which it is actually engaged.

The organization of such a method of gathering information and news from so wide an extent of territory as is done by the appellee corporation, and the dissemination of that news, requires the expenditure of vast sums of money. It reaches out to the various parts of the United States, where its agents gather news which is wired to it, and through it such news is received by the various important newspapers of the country. Scarcely any newspaper could organize and conduct the means of gathering the information that is centered in an association of the character of the appellee because of the enormous expense, and no paper could be regarded as a newspaper of the day unless it had access to and published the reports from such an association as appellee. For news gathered from all parts of the country the various newspapers are almost solely dependent on such an association, and, if they are prohibited from publishing it or its use is refused to them, their character as newspapers is destroyed and they would soon become practically worthless publications. The Associated Press, from the time of its organization and establishment in business, sold its news reports to various newspapers who became members, and the publication of that news became of vast importance to the public, so that public interest is attached to the dissemination of that news. The manner in which that corporation has used its franchise has charged its business with a public interest. It has devoted its property to a public use, and has, in effect, granted to the public such an interest in its use that it must submit to be controlled by the public for the common good, to the extent of the interest it has thus created in the public in its private property. The sole purpose for which news was gathered was that the same should be sold, and all newspaper publishers desiring to purchase ⁴⁵⁰ such news for publication are entitled to purchase the same without discrimination against them.

It was held in *New York etc. Stock Exchange v. Board of Trade*, 127 Ill. 153, 163, 11 Am. St. Rep. 107: "Assuming these market quotations and reports are property and the private property of the board of trade, yet if they have been so used by the board, and by the telegraph company with the knowledge and consent of the board, as to become affected with a public interest, then they are subject to such public regulation by the legislature and the courts as is necessary to prevent injury to

such public interest. The doctrine in question has application both to the property of individuals and of corporations, and it is therefore immaterial that any such corporation may be a mere private corporation. If the interest is public, then it is necessarily, to all alike, common to all and upon equal terms. The doctrine, as applied to the matter of these market quotations, would forbid that a monopoly should be made of them by furnishing them to some and refusing them to others who are equally willing to pay for them and be governed by all reasonable rules and regulations, and would prevent the board of trade or the telegraph companies from unjustly discriminating in respect to the parties who will be allowed to receive them." This principle is sustained in *Friedman v. Gold etc. Tel. Co.*, 32 Hun, 4, and *Smith v. Gold etc. Tel. Co.*, 42 Hun, 454. The appellee corporation being engaged in a business upon which a public interest is engrafted, upon principles of justice it can make no distinction with respect to persons who wish to purchase information and news, for purposes of publication, which it was created to furnish.

It is urged, however, that by the terms of the contract appellant cannot retain its membership and stock in the Associated Press, and have the right to purchase news accumulated by it at contract price, without complying with that part of the contract which requires appellant ⁴⁵¹ to refrain from receiving news from any person or corporation which has been declared by the board of directors of appellee to be antagonistic to the latter, and without appellant being controlled or governed by the by-law of appellee to the same effect. The character of appellee's business is not to be determined by the contract which it made respecting the liabilities which would attend it, but by the nature of the business, its fixed legal character, growing out of the manner in which that business is conducted, and the purpose of its creation. The legal character of the corporation and its duties cannot be disregarded because of any stipulation incorporated in a contract that it should not be liable to discharge a public duty. Its obligation to serve the public is not one resting on contract, but grows out of the fact that it is in the discharge of a public duty, or a private duty which has been so conducted that a public interest has attached thereto.

In *Smith v. Gold etc. Tel. Co.*, 42 Hun, 454, an action was brought to restrain the defendant from removing from complainant's office a ticker, or from doing any act which would in any way interfere with the receipts of quotations from the stock

exchange. By one of the clauses of the contract the plaintiff agreed that the company might forthwith discontinue its service without notice, whenever, in its judgment, any breach of the terms of the contract should be made by him. It was held: "But so long as collecting and supplying quotations is carried on by them, as it is conceded to be at present, they should render equal and impartial service to those who comply with reasonable regulations. What regulations are reasonable may not in all cases be easy to determine, but there need be no hesitation in saying that the clause of their contract permitting them to discontinue the service when, in their judgment, a breach of conditions has been had, is not a reasonable regulation and affords no defense to this action. No man can be judge in his own case, and ⁴⁵² to justify defendants in refusing to perform service there must be a reason that the court can pronounce sufficient."

In *Commercial Union Tel. Co. v. New England Tel. Co.*, 61 Vt. 241, 15 Am. St. Rep. 893, a question arose as to compelling a telephone company to furnish telephone service. In defense it was sought to set up a contract between the Bell Telephone Company and the respondent restricting the right to the use of their instruments, but the court held there was no right to discriminate and that the restricting clause was invalid, and it was said: "On the ground of public policy, which controls all public carriers, that clause in the contract in question is held void, so that the license stands precisely as if the restricting clause was not contained in it."

The clause of the contract in this case which sought to restrict appellant from obtaining news from other sources than from appellee is an attempt at restriction upon the trade and business among the citizens of a common country. Competition can never be held hostile to public interests, and efforts to prevent competition by contract or otherwise can never be looked upon with favor by the courts. In *People v. Chicago Live Stock Exchange*, 170 Ill. 556, 62 Am. St. Rep. 404, it was said: "Efforts to prevent competition and to restrict individual efforts and freedom of action in trade and commerce are restrictions hostile to the public welfare, not consonant with the spirit of our institutions, and in violation of law."

Section 8 of article 11 of the by-laws of the appellee sought to prevent any member of the appellee association from furnishing its special or other news to or receiving such news from any person declared by it hostile. In *People v. Chicago Live*

Stock Exchange, 170 Ill. 570, 62 Am. St. Rep. 409, in speaking of the power to enact by-laws, and their effect, we said: "When a corporation is created, there goes with it the power to enact by-laws for its government and guidance, as well as for the guidance and government of its members. This power is necessary to enable a corporation ⁴⁵³ to accomplish the purpose of its creation. But by-laws must be reasonable and for a corporate purpose, and always within charter limits. They must always be strictly subordinate to the constitution and the general law of the land. They must not infringe the policy of the state nor be hostile to public welfare. . . . Attempts to place restrictions on trade and commerce, and to fetter individual liberty of action by preventing competition are hostile to public welfare and affect the interests of the people. Such attempts by a corporation are an abuse of its corporate franchise. Public policy requires that corporations, in the exercise of powers, must be confined strictly within their charter limits and not be permitted to exercise powers beyond those expressly conferred. The state provides for the creation of corporations. The corporation is its creature and must always conform to its policy. This duty on the part of corporations to do no acts hostile to the policy of the state grows out of the fact that the legislature is presumed to have had in view the public interest when a charter was granted to the corporation, and no departure from its charter purposes will be allowed which would be hurtful to the public."

The by-law of the appellee corporation above referred to is not required for corporate purposes nor included within the purposes of the creation of that corporation. To enforce the provisions of the contract and this by-law would enable the appellee to designate the character of the news that should be published, and, whether true or false, there could be no check on it by publishing news from other sources. Appellee would be powerful in the creation of a monopoly in its favor, and could dictate the character of news it would furnish and could prejudice the interests of the public. Such a power was never contemplated in its creation and is hostile to public interests. That by-law tends to restrict competition, because it prevents its members from purchasing news from any other source than from itself. It seeks to exclude from ⁴⁵⁴ publication, by any of its members, news procured from any other corporation or source than itself which it declares antagonistic to it. Its tendency, therefore, is to create a monopoly in its own favor and to pre-

vent its members from procuring news from others engaged in the same character of work, and such provision is illegal and void: *Adams v. Brennan*, 177 Ill. 194, 69 Am. St. Rep. 222. In *Holden v. Alton*, 179 Ill. 318, it was held that equity would enjoin the city from carrying out a contract for city printing at the suit of a taxpayer who was the lowest bidder on a contract, and whose bid was rejected because he did not employ members of a certain labor organization and could not show the label declared by the ordinance making such qualification to be essential, and it was held that such a combination or agreement was in violation of common right and tended to create a monopoly, and that could not be tolerated. To the same effect is *Fishburn v. Chicago*, 171 Ill. 338, 63 Am. St. Rep. 236. The clear effect of this by-law is to create a monopoly, which renders it void.

The provisions of the contract that the appellant should purchase news from no other source, and the restrictive clause of the by-law, are both null and void, and the contract is the same as if these provisions had not been incorporated therein. Rejecting entirely these illegal provisions, on which the right to suspend the appellant as a member and to refuse to furnish it news and information gathered by the Associated Press for publication rests, no reason is presented, under the pleadings and affidavits in this case, why the appellant is not entitled to an injunction, as prayed for in its bill. The bill alleges that the deprivation of such reports by the Associated Press would cause an irreparable injury and damage to the appellant, which is sought to be prevented by the injunction prayed for in this bill.

We hold that the circuit court of Cook county erred in entering a decree dismissing the bill for want of equity, and the appellate court for the first district erred in ⁴⁵⁵ affirming the same. The judgment of the appellate court for the first district and the decree of the circuit court of Cook county are each reversed, and the cause is remanded to the circuit court of Cook county, with directions to enter a decree as prayed for in the bill.

TELEGRAPH COMPANIES ARE PUBLIC SERVANTS, and are bound to serve whenever called upon, their charges being paid or tendered: *Western Union Tel. Co. v. Dubois*, 123 Ill. 248, 15 Am. St. Rep. 109.

TELEPHONE COMPANIES—DUTIES OF.—Telephone companies are obliged to extend their facilities to all persons who comply with reasonable regulations and make due compensation. They have no right to discriminate between persons and corporations, and courts

will interpose by writs of mandate in favor of persons to whom the use of the telephone is denied: See extended note to *Central Union Tel. Co. v. Falley*, 10 Am. St. Rep. 131.

TELEPHONES—RESTRICTING USE OF.—A contract between the patentee and licensor of telephone companies restricting the use thereof to certain portions of the public is void: *Commercial Union Tel. Co. v. New England etc. Co.*, 61 Vt. 241, 15 Am. St. Rep. 893.

MONOPOLIES—PUBLIC BUSINESS.—Whatever tends to create a monopoly and to prevent competition between those engaged in a public employment or business impressed with a public character is opposed to public policy and unlawful: *People v. Chicago etc. Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 819; *Fishburn v. Chicago*, 171 Ill. 338, 63 Am. St. Rep. 236.

PEABODY v. NEW ENGLAND WATERWORKS CO.

[184 ILLINOIS, 625.]

RECEIVERS—POWERS.—A receiver appointed to wind up the affairs of a corporation represents not only the corporation but also its creditors, and as the representative of the creditors he is invested with powers and may do acts that could not be done by a mere representative of the corporation.

RECEIVERS—POWERS—OPENING JUDGMENT AGAINST CORPORATION.—Where, through fraud and collusion, a judgment has been obtained against a corporation after the appointment of a receiver to wind up its affairs, the effect of which judgment is to diminish the estate which should properly come to the receiver, such receiver may move to reopen the judgment and be allowed to enter a defense.

Runnells & Burry, for the appellant.

Otis H. Waldo and Wilson, Moore & McIlvaine, for the appellees.

625 **PHILLIPS, J.** The principal question presented on this record is whether a receiver of a corporation, after whose appointment judgments are obtained against the corporation in favor of third parties, occupies such a relation that, for 626 the protection of the corporation and creditors, he may appear and move to reopen the judgments and allow a defense. The question was held adversely to the receiver by both the circuit and appellate courts, and hence this appeal.

We take from the opinion of the appellate court a partial statement of the facts of the case: "Appellant was, May 1, 1895, appointed receiver of the American Waterworks Company of Illinois in a proceeding, under section 25 of the corporation act,

to wind it up, begun in the circuit court. April 10, 1897, each of the appellees began suits in assumpsit in the same court, on the law side, against the corporation. It on the same day entered its appearance, waived a jury and practically consented to judgments in favor of the appellees, in favor of the New England Waterworks Company of two hundred and forty-two thousand seven hundred and ninety-five dollars and fifty cents and in favor of the United Waterworks Company of six thousand one hundred and eighty-eight dollars and sixty-two cents. April 17, 1897, and during the same term, the receiver, appellant here, entered a motion in each of the law cases to vacate the judgments, for leave to plead, and to make defense on behalf of the corporation in his name as receiver, or otherwise, which was denied. On the hearing of these motions the receiver presented affidavits tending to show, and for the purposes of this decision it may be conceded did show, a good defense to each of the suits, in part, at least, that the judgments were unjust as against the insolvent corporation, and that they were entered by collusion between the appellees and the officers of the defendant corporation."

By section 25 of the corporation act it is provided: "And courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor, who shall have authority, by the name of the receiver of such corporation [giving the name], to sue in all courts and do all things necessary to closing up its affairs, as commanded by the decree of such court."

⁴²⁷ The provisions of section 25 are not intended to limit the powers of a receiver appointed under the chancery practice, but to extend the powers of the court in the matter of the causes which shall be deemed sufficient to authorize the appointment of a receiver and the causes for which the affairs of a corporation may be closed up. A receiver is to be regarded as the representative not only of the corporation, having power of asserting its rights, taking its title and subject to its liabilities, but occupies a still broader position, for he represents not only the corporation but also its creditors, and under his duties as the representative of the latter class he is invested with powers and may do acts that could not be done by a mere representative of the corporation. It is said in Gluck and Becker on Receivers, page 177: "The receiver of an insolvent corporation, while, as a general rule, he is to be regarded as the representative of the corporation, asserting its rights, taking its title and subject

to its liabilities, in one respect occupies a broader position, and represents not only the corporation but also the creditors, and when in any proceeding he occupies exclusively the latter status, he may do, and under some circumstances must do, many things which, if his acts were strictly limited to those of a representative of a corporation, he could not do. . . . He may file exceptions to the report of a referee appointed to take proof of claims, and for that purpose represents not only the corporation, but he stands as a trustee of its funds for all creditors, and may intervene to see that no injustice is done to anyone."

In *Whittlesey v. Delaney*, 73 N. Y. 571, it was held that a corporation having become insolvent, its receiver, as the representative of creditors, has the capacity to make the objection that a judgment against the corporation by confession was not obtained in such a manner as to be binding upon the corporation. To the same effect is *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237.

⁶²⁸ In *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, it was held: "It is claimed that no action could have been maintained by the trustee, representing the trust combination, against the Brush Electric Light Company, to recover the purchase price of the carbons, for the reason that the illegality of the combination would have constituted a good defense. Assuming this predicate, it is asserted that the receiver stands in the same position and that his title is subject to the same infirmity as that of the combination which he represents. Without considering the assumption upon which his proposition is based, it is a sufficient answer to the proposition asserted, 'that the receiver unites in himself the right of the trust combination and also the right of creditors, and that he may assert a claim as the representative of creditors which he might be unable to assert as a representative of the combination merely.' The general rule is well established that a receiver takes the title of the corporation or individual whose receiver he is, and that any defense which would have been good against the former may be asserted against the latter. But there is a recognized exception which permits the receiver of an insolvent individual or corporation, in the interest of creditors, to disaffirm dealings of the debtor in fraud of their rights. Assuming that the trustee could not have recovered of the Brush Electric Light Company for the reasons suggested, it would be a very strange application of the doctrine that no right of action can spring from an illegal transaction which should deny to innocent cred-

itors of the combination, or to the receiver who represents them, the right to have the debt collected and applied in satisfaction of their claim." To the same effect are *Moise v. Chapman*, 24 Ga. 249, and *Hamor v. Taylor-Rice Engineering Co.*, 84 Fed. Rep. 393. In the latter case it is said: "The receivers, representing both the creditors and the defendant, have the right to assert any defense to which the creditors, in contradistinction to the defendant, are entitled."

⁶²⁹ In *Republic Life Ins. Co. v. Swigert*, 135 Ill. 150, it was said (page 167): "We understand the rule to be, that where a receiver is appointed for the purpose of taking charge of the property and assets of a corporation, he is, for the purpose of determining the nature and extent of his title, regarded as representing only the corporate body itself, and not its creditors or shareholders, being vested by law with the estate of the corporation, and deriving his own title under and through it, and that for purposes of litigation he takes only the rights of the corporation such as could be asserted in its own name, and that upon that basis only can he litigate for the benefit of either shareholders or creditors." The opinion in the last-mentioned case then proceeds to discuss the power of a receiver, and holds that, so far as the title of the property is concerned, the power of the receiver is solely and only a power with reference to the corporation. The opinion then further holds (page 177): "But so far as his powers are derived from a statute or from a lawful decree of court, and the powers do not involve rights which, at the time of his appointment, were vested in such owners, he is not merely their representative, but is the instrument of the law and the agent of the court which appointed him. Such right and authority as the law and the court rightfully give him he possesses, and in respect to such right he is not circumscribed and limited by the right which was vested in and available to the owners."

In *Knights v. Martin*, 155 Ill. 486, the court said (page 489): "This was a motion to quash an execution issued upon a judgment confessed in vacation and to set aside the judgment. Shortly after the judgment was confessed the judgment debtor executed to appellee a deed of assignment of all his property for the benefit of his creditors. The motion was made in the name of the judgment debtor and his assignee, but before decision the debtor formally withdrew the motion as to himself and it was afterward prosecuted by the assignee." The motion was denied. ⁶³⁰ The court then further says: "Appellants con-

tend that appellee was not a proper party to make this motion, which was made under section 65 of chapter 110 of the Revised Statutes. The assignee takes the same interest and title in the assigned estate that his assignor possessed, and his title will be subject to all the equities that existed in respect thereof in the hands of the assignor, and he may do whatever his assignor might have done in respect of the assigned property if no assignment had been made. . . . We are of the opinion that the relationship of the assignee to his assignor and to the assigned estate is such that he may be considered a proper party to make this motion, notwithstanding the rule that no one but a party to a judgment or execution can move to set aside a judgment or quash the execution."

The receiver in this case was appointed under the provisions of section 25 of the act with reference to corporations, which statute authorizes him to close up the business of the corporation and do all things necessary to that end, to sue in all courts, etc. The decree under which he was appointed directed: "That any and all officers, agents, attorneys, servants, and employes of said defendant, and any and all parties having in their possession or under their control any of the property or assets of the defendants, immediately surrender all such property and assets to the receiver hereinbefore named, and that they, and each and all of them, refrain from in any manner intermeddling with said property or withholding possession thereof from such receiver; and they, and each of them, are hereby enjoined from any and all attempts to withhold or conceal any of said property from said receiver, and from contracting any liabilities in the name or on behalf of said defendant Illinois corporation, or of using its name for any purpose or in any proceeding; and all parties having any claims against said defendant Illinois corporation are hereby directed to present the same in this proceeding for adjudication."

⁶³¹ It is absolutely necessary in closing up the business of a corporation, as provided by the foregoing provision of the statute, that there must not only be a collection of the debts owing to it, but there must be a determination as to the debts due from the corporation before the court can equitably distribute the funds of the corporation in the payment of debts. In this case, having in view the proper distribution of the funds of the corporation, the court, by its decree, specifically directed that all persons should refrain from interfering with the property or withholding possession thereof from the receiver, and

that the defendant and others should be "enjoined from any and all attempts to withhold or conceal any of such property from said receiver, and from contracting any liabilities in the name or on behalf of said defendant . . . or using its name for any purpose or in any proceeding." The officers of this corporation, under this decree, were prevented from the execution of promissory notes, and from doing any act increasing the liability of this corporation, by which the assets in the hands of the receiver should be diminished or destroyed.

The circumstances under which the promissory note for which this judgment was rendered was given are strongly indicative of fraud and collusion. The judgment is prejudicial to the estate in the hands of the receiver. By it the estate would be diminished and the amount in the hands of the receiver for the payment of valid claims would be greatly lessened. One of the appellees is the chief stockholder in both of the corporations. As a stockholder in the corporation in whose favor a judgment was rendered he becomes the chief beneficiary by that judgment, and through his action there is effected a change in the character of the estate coming to the hands of the receiver and for his own benefit. To hold that the receiver, in such a case, should not be permitted to appear and contest a judgment collusively entered into would be denying him the power of properly closing ⁶³² out the business of the corporation, collecting its assets, and distributing the estate to those equitably entitled thereto. We are of opinion that where there is fraud and collusion in obtaining judgments against a corporation for which a receiver has been appointed, the effect of which judgments will be to diminish the estate in the receiver's hands or which should properly come to him, or which would prevent its proper distribution to those equitably entitled thereto, the receiver has such a standing in court with reference to the estate that for the purpose of closing out the estate he may appear and collect what is properly owing to the corporation, and defend not only the corporation, but protect its creditors and stockholders from collusive and fraudulent judgments.

We are of opinion that it was error in the appellate court for the first district and in the circuit court of Cook county to hold that the receiver had no such relation to this proceeding that he could appear and move to set aside the judgments. Entertaining this view of the case, we deem it unnecessary to discuss the question as to the right to file counter-affidavits on this motion.

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The judgment of the appellate court for the first district and the judgment of the circuit court of Cook county are each reversed and the cause is remanded.

Cartwright, C. J., and Boggs, J., dissenting.

RECEIVERS—POWERS OF.—A receiver of an insolvent corporation represents its creditors as well as its stockholders, and holds the property for the benefit of both. He is a trustee for both, and as trustee for the creditors may maintain and defend actions which the corporation could not: *Franklin Nat. Bank v. Whitehead*, 149 Ind. 500, 63 Am. St. Rep. 302.

CASES
IN THE
SUPREME COURT
OF
IOWA.

MAY v. MAY.

[108 IOWA, 1.]

DIVORCE—ADULTERY—CONNIVANCE.—A husband who employs a spy to have sexual intercourse with his wife is not entitled to a divorce on the ground of her adultery, where such intercourse takes place.

DIVORCE—CRUELTY—CONDONATION.—A wife is not entitled to a divorce on the ground of her husband's cruelty, where she made no complaint of his acts at the time and was largely to blame therefor herself; where she apologized for her own acts; where she continued to live with him long after such acts of cruelty were committed; and where there is no future danger to be apprehended as to her life or health. Such conduct clearly amounts to a condonation.

Suit for a divorce brought by a husband against his wife. The latter also sued him for a divorce. In each case a divorce was denied, and both parties appealed. The wife having perfected her appeal first is called the "appellant."

Longueville, McCarthy & Kenline, for the appellant.

Lyon & Lyon, John B. Utt, and Matthews & Barnes, for the appellee.

* **DEEMER, J.** 1. Plaintiff and defendant were married at Jamestown, Wisconsin, on or about November 23, 1877, and lived together as husband and wife until February 19, 1897. Five children were born to them. For many years there have been frequent quarrels between them, which finally culminated in what we will denominate the "McGregor incident," which will be hereinafter referred to. Plaintiff has been almost in-

sanelly jealous of his wife, and, to say the least, her conduct has not at all times been discreet. We are satisfied, too, that plaintiff has at times shamefully abused the defendant; but many of their quarrels were provoked by the wife. It is charged in the petition that defendant has been guilty of adultery with at least four different persons. Defendant denies that she was guilty of adultery with any of them, and alleges as grounds for divorce from plaintiff that he has been guilty of such cruel and inhuman treatment as to endanger her life. There is evidence in the record tending to show unlawful and illicit relations between defendant and three different men. As to one, it produces no more than a suspicion of improper conduct, but as to the * other two it is direct. Notwithstanding its directness, we are satisfied that there is no truth whatever in the claim that she had intercourse with one of these two men. It appears without dispute, however, that in the month of February, 1897, defendant left her home in Dubuque without notifying any of her family that she was going; went to the town of McGregor, part of the way in company with a man by the name of Blanchard, who assumed the name of Brown; and then went to a hotel, where Blanchard registered the two as E. H. Brown and wife, from Chicago, who were assigned to a single room. Blanchard introduced defendant as Mrs. Brown, and was in her room, in conversation with her, during the evening. Early the next morning, plaintiff appeared upon the scene, was shown to the room where defendant was staying, and there a controversy arose between them as to what had occurred between her and Brown during the night. There is a dispute as to the length of time Brown was in the room and as to what occurred there, and the witnesses do not agree as to what was said when plaintiff appeared. There is also some little dispute as to what defendant's purpose was in leaving home. We are satisfied, however, that she thought she was going to Elkader, and that she did not know she had to stay over night in McGregor.

On the one hand, it is contended that defendant committed adultery with Blanchard, alias Brown, in the hotel, on the night in question; while on the other it is stoutly contended that, while the defendant may have been indiscreet, yet she did not have any illicit relations with Blanchard, and that whatever was done was with the husband's connivance and consent. We do not find it necessary to determine which is right in this contention, although we may say that defendant's conduct was, to say the least, very injudicious. But if it be conceded that the

act of adultery was in fact committed, plaintiff is in no position to take advantage of it. The evidence very clearly establishes the fact that plaintiff induced Blanchard to go to his ⁴ home, to act as a spy, to see if he could not discover the wife in the act of adultery. He lived there in that relation for some time before he induced the defendant to go to McGregor, and she went on the false pretense that she was to go to Elkader, to visit friends. Not only was Blanchard invited into plaintiff's home for the purpose of procuring evidence against his wife, but we are also satisfied that he was employed by plaintiff for the purpose of having intercourse with the defendant, if he found it possible to do so. If, then, Blanchard did have intercourse with defendant, it was with plaintiff's consent, and through his connivance, and he cannot be heard to complain: *Cane v. Cane*, 39 N. J. Eq. 148. "That to which a party consents is not esteemed, in law, an injury," is an old maxim, which is especially applicable to such a case as this. From the fact that the husband appeared upon the scene at the time he did it is quite evident that he knew of the whole plan, and, in effect, consented to it. A court of equity will not grant relief under such circumstances: *Pierce v. Pierce*, 3 Pick. 299, 15 Am. Dec. 210; *Hedden v. Hedden*, 21 N. J. Eq. 61; *Myers v. Myers*, 41 Barb. 114. Plaintiff has no right to complain of his wife's conduct at McGregor. The other acts of adultery alleged by plaintiff are not sustained by sufficient evidence to justify a decree in his favor, and the trial court was right in dismissing his petition.

2. The evidence introduced by defendant shows that plaintiff has been guilty of various acts of cruelty, which would ordinarily entitle her to a divorce. But here it appears that she was in many, if not in most, instances to blame. Barring certain conduct of plaintiff, which occurred so long ago that the presumption of condonation obtains, it appears that defendant persisted in keeping company with a certain man against the plaintiff's protests. Whenever he discovered that she had been in this man's company (and we may remark parenthetically that we find no evidence of anything more than the slightest improprieties ⁵ between them), a controversy arose, which always resulted in hard words between them, and sometimes blows. Defendant was to blame for not observing her husband's admonitions about not talking to, or being in company with, this man; and generally she took her own part in the quarrels which resulted after she had disobeyed these instructions. In other words, she at times provoked the plaintiff into making his as-

saults, and at others made an assault upon plaintiff herself. But aside from all this she continued to live and cohabit with her husband down to within a few days of the McGregor incident. She made no complaint of his conduct, but apologized for her own, and seemed content to live with him to the very last. Her conduct clearly amounts to a condonation of her husband's offenses, serious as some of them may have been: *Gardner v. Gardner*, 2 Gray, 434; *Phillips v. Phillips*, 27 Wis. 252; *Douglas v. Douglas*, 81 Iowa, 258. It goes without saying that if we were satisfied that plaintiff's acts of cruelty would be repeated, and that there is danger to defendant's life or health, should she continue to live with the plaintiff, we would be slow to find that condonation should avail the plaintiff in defending against his wife's petition. This does not appear, however. Indeed, there is little, if any, evidence that defendant's life or health were ever endangered. She seemed to be content to live with her husband during all the years he was practicing his cruelty, and we do not think had a thought of bringing a divorce suit until plaintiff began his action. Under such a state of affairs, we may well doubt defendant's sincerity in bringing her suit. We are not to be understood as holding that defendant was guilty of adultery at the town of McGregor, or that plaintiff's conduct toward his wife is to be approved. We simply find that neither party is in position to obtain a decree of divorce. The case is peculiar in many of its aspects, and is an extremely unfortunate one for both of the parties. They have children, who they are each anxious should procure a good education—two of them being in the ⁶ high school in the city of Dubuque; they have ample means to provide for the necessities and most of the luxuries of life; and there is every reason why they should live together harmoniously as husband and wife. Plaintiff, as we have said, is extremely jealous, and defendant may not have been entirely discreet in her conduct; but due consideration by each of the feelings and conduct of the other ought to remedy all evils, bring these parties together, and effectuate a reconciliation which will be lasting. The decree of the district court is, on both appeals, affirmed.

DIVORCE—ADULTERY.—CONNIVANCE at an act for divorce bars the right of divorce, because no injury is received; for what a person has consented to, he cannot set up as an injury: *Dennis v. Dennis*, 68 Conn. 186, 57 Am. St. Rep. 95.

DIVORCE—CRUELTY—CONDONATION.—Courts grant divorces for cruelty, not so much to punish offenses already committed as to relieve the complaining party from an apprehended danger:

Morris v. Morris, 14 Cal. 76, 78 Am. Dec. 615; and if the injured party is willing to forgive the offense, the law may well give full effect to such forgiveness: **Note to Jones v. Jones**, 90 Am. Dec. 612; though a divorce for cruelty may be granted when, from all the circumstances, it appears that one of the parties justly apprehends danger to life, limb, or health: **Nogees v. Nogees**, 7 Tex. 538, 58 Am. Dec. 78.

IN RE ESTATE OF LONGER.

[108 Iowa, 84.]

WILLS—NO PARTICULAR FORM is required for a will, and the words "I agree to will" in an instrument intended to create a testamentary gift mean nothing more than "I do will."

WILLS.—WHEN THE ANIMUS TESTANDI is established, the character of the instrument is fixed. It is a will.

WILLS—WHAT IS A WILL.—An instrument dated and commencing, "I agree to will," but intended by the deceased as a will, and which was executed and witnessed as provided for in the case of wills, is a will.

WILLS—PROBATE OF.—An instrument may be entitled to probate as a will though some of its terms are meaningless.

Proceeding to probate an instrument purporting to be a will. The probate was contested and refused. The proponents appealed.

C. J. Wilson and H. M. Eicher, for the appellants.

No appearance for the appellee.

WATERMAN, J. The instrument offered for probate was as follows:

"February 17, 1897. I agree to will to Rpsie Hinek four hundred and fifty dollars \$450.00. Jim Longer a house and lot in Riverside. Any Marek two hundred and fifty dollars \$250.00. Barbara Fouchek three hundred dollars \$300.00. Mary Hotz five dollars \$5.00. Jose Hinek one hundred and fifty dollars \$150.00. Fannie Parizk five hundred dollars \$500.00. And what remains to Jim Longer's children. The funeral expensis is to be paid by Jim Longer.

"Witnesses

VACLAV LONGER.

"Justice of the Peace

"Ed. Stackman.

"Jozef Rabaa."

Among other objections urged by the contestants, it was said that the instrument is not, in fact, a will. In addition to the testimony relating to its execution, the court received evidence as to the intent and purpose of Longer in executing it, and made the following finding:

"3. At the time of the signing, subscribing, and execution of said instrument as aforesaid, said Vaclav Longer was of sound and disposing mind; and said instrument was voluntarily executed by him, with knowledge of its provisions, without any undue influence or fraud exerted upon him in the execution of the same. 4. The parol evidence introduced shows that at the time of the signing and execution of said instrument, exhibit 'A,' the said Vaclav Longer thought he was thereby executing his last will and testament, and intended the said instrument, exhibit 'A,' at the time of its execution, to be and constitute his last will and testament. 5. At the time and place of the execution of said instrument the said Vaclav Longer requested the witnesses thereto, to wit, Ed. Stackman and Jozef Rabas, to subscribe their names to said instrument as witnesses to his will; and in obedience to said request, properly and correctly communicated, the said witnesses did at said time and place properly subscribe their names to said instrument and witnessed the same as the last will and testament of the said Vaclav Longer. 6. The said instrument, exhibit 'A,' was in every manner and form executed and witnessed in full and complete compliance with the provisions for the execution, signing, and witnessing of wills in the state of Iowa, except as hereinafter stated: Said Vaclav Longer died on or about the twenty-eighth day of February, 1898, near Lone Tree, in Johnson county, Iowa, and said instrument, exhibit 'A,' was executed at the same place. 7. At the time of the death of said Vaclav Longer he was upward of sixty years old, and he was the owner of a house and lot, located in Riverside, in Washington county, Iowa, and about two thousand dollars (\$2,000) in personal property. 8. Said Vaclav Longer, deceased, made no effort to execute a will, except the execution of exhibit 'A,' offered in evidence in the trial of this cause; and said Vaclav Longer and James Longer are one and the same person. 9. The court further finds that the said instrument, exhibit 'A,' is not sufficient in its terms to constitute a will or testament, in that the same has no expression or terms of bequest or devise to any parties therein named, or any other person. Therefore the finding of the court herein is against the proponents, and the said instrument, exhibit 'A,' is refused ad-

mission to probate as the last will and testament of Vaclav Longer, deceased, and hereby declared, from its terms, to constitute no will.
D. RYAN, Judge."

We cannot agree with the conclusion of law announced by the trial court. No particular form is required for a will. Much latitude is allowed in the construction of such instruments: *Wescott v. Binford*, 104 Iowa, 645, 651, 652, 65 Am. St. Rep. 530. The ³⁷ main object of the courts is to learn the intention of the maker. The intention being known, all inartificiality of language or looseness of expression must yield to, and be governed by, it. Different papers may be construed together, as constituting a will. An instrument in the form of a deed, but executed with the formalities of a will, and by its terms to take effect after death, has been held a will: *Lautenschlager v. Lautenschlager*, 80 Mich. 285. See, also, *Schouler on Wills*, sec. 265. Furthermore, we may say that, in the absence of all extrinsic evidence as to the intention of Longer, we think the trial court allowed undue force and weight to the word "agree," as used in this instrument. If this was an agreement only, it was unilateral, and there is no pretense of consideration. To consider the instrument as a naked promise to make a will is to let go for naught all the formalities of its execution. Looking to the writing alone, and it appears that the words "I agree to will" mean nothing else than "I do will." The words "I agree to sell," in a contract, have been held to import a present sale: *Ives v. Hazard*, 4 R. I. 16, 67 Am. Dec. 500. See, also, *Martin v. Adams*, 104 Mass. 262; *Baldwin v. Humphrey*, 44 N. Y. 609. But aside from these considerations, the finding of the court that this instrument was intended to create a testamentary gift is controlling: *Schouler on Wills*, sec. 272. To ascertain this intent, when the terms of the writing are not clear, collateral evidence may be received, as was done in this case: *Schouler on Wills*, sec. 273. When the *animus testandi* is established, the character of the instrument is fixed—it is a will.

What construction should be given certain provisions of this instrument, in view of the court's finding that Jim Longer, named in the will, is identical with the testator, is a matter upon which we are not called on to express an opinion. An instrument may be entitled to probate, though some of its terms are meaningless.

Reversed.

WILLS—IMMATERIALITY OF FORM.—The form of a will is not material if a testamentary intention is apparent from the face of the paper. An instrument is a will, whatever its form, if the intention of the maker to dispose of his estate after death is sufficiently manifested, and this intention is lawful in itself, and the writing has the statutory formalities. The intent of the testator must control in construing the will: *Gaston's Estate*, 188 Pa. St. 374, 68 Am. St. Rep. 874, and note. Compare *Mitchell v. Donohue*, 100 Cal. 202, 38 Am. St. Rep. 279.

A WILL VOID IN PART may nevertheless be good for the residue: *Kane v. Gott*, 24 Wend. 641, 35 Am. Dec. 641.

WELLS v. ORDWAY.

[106 IOWA, 66.]

MORTGAGES—FORECLOSURE FOR PART OF CLAIM—REDEMPTION—EXTINGUISHMENT OF LIEN.—If the holder of subsequent mortgages on property buys the first mortgage, which he forecloses, and purchases the property for the amount of the decree, without mention in any of the proceedings of the other mortgages held by him, and makes no attempt to redeem from himself, but accepts the redemption money without protest, the lien of the subsequent mortgages is thereby extinguished, and one who owns the mortgagor's equity of redemption is entitled to their release upon paying the amount of the judgment, interest, and costs in the foreclosure case.

Suit to quiet title and to obtain the release of certain mortgages. There was a decree for the plaintiff and the defendant appealed.

MacKenzie, Dewey & Jackson, for the appellant.

Chrisman & Chrisman, for the appellee.

DEEMER, J. The facts which are not in dispute are as follows: October 1, 1887, one Isom was the owner of one hundred and twenty acres of land lying in Monona county. ⁸⁷ On that day he executed a mortgage on the premises to one Edward S. Hall to secure a note for the sum of six hundred and fifty dollars. Thereafter Isom sold the land to one Tipton, and Tipton, on the ninth day of January, executed a mortgage upon the same to the defendant, Ordway, to secure a note for the sum of four hundred and sixty dollars. Afterward, and on the sixteenth day of April, 1894, Tipton executed a second mortgage upon the premises to Ordway to secure a note for the sum of six hundred and twenty-five dollars. These last two mortgages were duly filed for record within a few days

after their execution. Some time prior to October, 1895, Hall sold and transferred his note and mortgage to Ordway, and Ordway brought suit upon the note and to foreclose the Hall mortgage at the October, 1895, term of the district court of Monona county. No mention was made in his petition of the two other notes and mortgages held by him upon the land. He obtained a decree in his foreclosure suit on the twenty-seventh day of December, 1895, and the premises were sold to Ordway under the decree for the amount of the judgment, interest, and costs. On December 21, 1896, Tipton sold the premises to the plaintiff, Wells, for the sum of two thousand five hundred dollars, and executed to Wells a warranty deed with covenants against all encumbrances save the judgment and decree rendered in the foreclosure proceedings. On the twenty-fourth day of December, 1896, Wells redeemed the lands from the foreclosure sale by paying the clerk of the district court of Monona county the exact amount of the judgment in the foreclosure case, interest, and costs, and taking the clerk's certificate therefor. Defendant Ordway accepted the redemption money from the clerk, and plaintiff is now in possession of the land. After the redemption plaintiff tendered to defendant the sum of one dollar and twenty-five cents, and demanded a quitclaim deed for the premises and a release of the two mortgages executed to him by Tipton. Defendant refused to comply with the request and this suit followed.

Defendant contends that the two mortgages executed to him by Tipton are liens upon the land, and the plaintiff is not entitled to a release of the same; while, on the other hand, plaintiff insists that as defendant was the owner of all the mortgages when he commenced his foreclosure proceedings, and as he did not include them in his foreclosure proceedings, and did not, as a junior creditor, redeem from the foreclosure sale, his two mortgages executed by Tipton are released and satisfied by operation of law. Now, while it is no doubt true that foreclosure of a mortgage may be had for installments due, and the cause continued on plaintiff's application for the maturity of subsequent installments (see *McDowell v. Lloyd*, 22 Iowa, 448; *Burroughs v. Ellis*, 76 Iowa, 649), yet that course was not adopted in this case. The court was neither asked to retain jurisdiction of the case in order that the subsequent mortgage might be foreclosed, nor was any mention made of them, either in the petition or in the decree granted by the court. The suit was simply to foreclose the Hall mortgage, and the decree or-

dered the sale of the premises to satisfy the same. After the sale Ordway did nothing to protect the liens held by him under the Tipton mortgages. On the contrary, he accepted the redemption money without protest, evidently in the belief that the Tipton mortgages were still liens upon the land. In the case of *Bank v. Percival*, 61 Iowa, 183, and *Stephens v. Mitchell*, 103 Iowa, 65, we held that a creditor may redeem from himself. We are not to be understood as holding, however, that Ordway had such a right in this case. Attention is called to the matter simply to show that he did not attempt its exercise. What, then, are Ordway's rights in the premises? We have frequently held that, unless the court retains jurisdiction of the case to provide for future installments, a sale of the mortgaged premises under foreclosure passes to the purchaser all the title and interest of the mortgagor and mortgagee in and to the premises, and that the purchaser takes free from the lien of the unpaid installments: *Escher v. Simmons*, ⁸⁹ 54 Iowa, 269; *Poweshiek County v. Dennison*, 36 Iowa, 244, 14 Am. Rep. 521; *Harms v. Palmer*, 61 Iowa, 483; *Hardin v. White*, 63 Iowa, 633. So where a mortgage is foreclosed for one installment of the debt, and during the period of redemption the mortgagor conveyed the property to a third person, agreeing to redeem, and afterward did redeem, it was held that such third person took the property free from the lien of the mortgage as to the balance: *Micklewait v. Raines*, 58 Iowa, 605. See, also, *Escher v. Simmons*, 54 Iowa, 269; *Todd v. Davey*, 60 Iowa, 532; *Blake v. Black*, 55 Iowa, 252. But it is contended that these rules do not apply to a case where the mortgagee holds separate notes and mortgages. We do not see that this fact in any manner affects the principle to be applied. If the two Tipton mortgages had been held by a stranger to the Hall mortgage, and this stranger had been made a party to the proceedings, there is no doubt that such stranger's right would be lost after his statutory right of redemption expired. On what theory, may we ask, does Ordway have any greater rights than such stranger? He was a party to the suit. He owned the Tipton notes and mortgages at the time the action was commenced, and held them at the time plaintiff made a redemption, yet he did nothing to protect them, and seemed content to accept the money paid by way of redemption. In order to protect himself, Ordway should have asked the foreclosure of all his mortgages, or, if he did not see fit to take this course, he should have bid all that he thought the land was worth,

and applied the excess over and above the amount of the judgment on the Hall notes to the satisfaction of his other notes. He may, perhaps, have had the right to redeem from himself; but in no event should he be allowed to speculate upon his debtor's necessities: *Harms v. Palmer*, 61 Iowa, 483; *Escher v. Simmons*, 54 Iowa, 269; *Dickinson v. White*, 64 Iowa, 708. In the case of *Moody v. Funk*, 82 Iowa, 1, 31 Am. St. Rep. 455, which was in principle quite like the case at bar, we said: "But there is a marked difference between the case of a redemption by the judgment ^{or} debtor and that of a redemption by his grantee. It is the policy of the law to secure to the debtor, as nearly as is practicable, the full value of his property sold on execution. If the execution creditor failed to bid for the land sold a just amount, the debtor should be permitted to transfer his interest to another for a fair consideration; and, if his grantee redeems, the execution creditor has no right to complain, for he might have bid for the land a larger sum. Nor is a junior lienholder prejudiced by such a transfer. It does not affect his right to redeem within the time given him by law, and, if he is not willing to give more for the land than the amount for which it was sold, he should not prevent the debtor from realizing what he can for his property." *Harms v. Palmer*, 73 Iowa, 446, 5 Am. St. Rep. 691, is quite like the case at bar, and in it we find this language: "If it was impracticable for the judgment debtor to avail himself of the right on account of the balance of the mortgage debt due by judgment against him, his only resource was to sell his right of redemption for what he could get. The defendant has no reason to complain that he is not allowed to follow the land. He should have bid at the execution sale until the property brought its full value. This court has persistently refused, as will be seen by the later decisions respecting judgment creditors' rights after execution sale, to lend itself to any scheme to sacrifice the judgment debtor's property": See, also, *Bevans v. Dewey*, 82 Iowa, 85; *Kilmer v. Gallaher*, 107 Iowa, 676. We are clearly of opinion that defendant's lien by reason of the Tipton mortgage is lost, and that the trial court was right in granting to plaintiff the relief demanded. The case of *Spurgin v. Adamson*, 62 Iowa, 661, relied upon by appellant, is not in point. In that case plaintiff did not own all the mortgages at the time he commenced his foreclosure suit. He acquired an independent lien after bidding in the property at a sale under his mortgage. Neither does *Stephens v. Mitchell*, 103 Iowa, 65, an-

nounce a rule at variance with what we have said. In that case Stephens bought the sheriff's ⁹¹ certificate issued under the foreclosure sale of a mortgage in which he had no interest, and subsequently bought a second mortgage, which he proceeded to foreclose. It was held that redemption from the first sale did not affect the second foreclosure.

The doctrine of merger does not apply to this case. If it did, we would be inclined to hold there was no merger of the Tipton mortgages. The only questions relate to the effect of a foreclosure for a part of defendant's claims and a redemption from the sale thereunder. The decree of the district court is affirmed.

MORTGAGES—FORECLOSURE FOR PART OF DEBT.—A REDEMPTION by a mortgagor's grantee of property sold upon execution, based upon a decree of foreclosure for part of the debt, divests the property of a judgment lien for the remaining part of the mortgage debt: *Harms v. Palmer*, 73 Iowa, 446, 5 Am. St. Rep. 621. Compare *Moody v. Funk*, 82 Iowa, 1, 31 Am. St. Rep. 455, in which it is said that the holder of an unsatisfied balance of a judgment cannot redeem from an execution sale made under the same judgment.

STATE v. COHEN.

[108 IOWA, 208.]

EVIDENCE—WHAT CIRCUMSTANCES ARRANGED “LINKWISE” MUST BE PROVED BEYOND A REASONABLE DOUBT.—It is not necessary that each essential fact in a chain of circumstances solely relied on to connect the accused in a criminal case with the commission of an offense, when separately considered, should be found beyond a reasonable doubt, as one essential fact may derive such support from others immediately connected therewith as to exclude all doubt of its existence; but, if a conviction depends entirely on different circumstances, arranged linkwise, connecting the defendant with the crime charged, then each and every one of these must be established beyond a reasonable doubt.

EVIDENCE—MINOR CIRCUMSTANCES OF THOSE ARRANGED “LINKWISE”—QUANTUM OF PROOF REQUIRED.—While each and every ultimate and essential fact necessary to a conviction in a criminal case must be established beyond a reasonable doubt, where a conviction depends entirely on different circumstances, arranged linkwise, connecting the defendant with the crime charged, yet it is not necessary that the minor circumstances relied on by the state to establish such ultimate and essential facts should be proved with the same degree of certainty, as some of these may fall of proof, and yet those essential to conviction be found from other evidence beyond a reasonable doubt.

INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—ERRONEOUS CHARGE.—IN A CRIMINAL CASE, where the evidence is

wholly circumstantial, it is erroneous to instruct the jury that they are not required, to warrant a conviction, to be satisfied beyond a reasonable doubt of each link in the chain of evidence relied upon to establish the defendant's guilt, and that it is sufficient if, taking the testimony altogether, they are satisfied, beyond a reasonable doubt, of his guilt, because the jury might understand therefrom that they are authorized to convict though an essential fact is not proved beyond a reasonable doubt.

INSTRUCTIONS IN CRIMINAL CASES—CIRCUMSTANTIAL EVIDENCE—CONSIDERATION OF FACTS.—A jury should not be instructed, in a criminal case depending upon circumstantial evidence, to pass upon each fact separately, though absolutely essential to conviction. All the facts must be considered together in determining the main issue.

INSTRUCTIONS—REASONABLE DOUBT.—IT IS ERROR, in an instruction, to define a "reasonable doubt" as one that the jury are able to give a reason for.

EVIDENCE, SECONDARY.—A COPY OF A COPY of an insurance policy is not admissible as secondary evidence in the absence of any reason given why the copy from the original is not produced.

Conviction for arson. The defendant appealed.

Mullan & Pickett, for the appellant.

Milton Remley, attorney general, and S. B. Reed, for the state.

²⁰⁹ LADD, J. The evidence was wholly circumstantial. The court, as the eleventh paragraph of the charge, gave this instruction: "The ruling requiring the jury to be satisfied beyond a reasonable doubt of the defendant's guilt, in order to warrant a conviction, does not require that the jury should be satisfied beyond a reasonable doubt of each link in the chain of evidence relied upon to establish the defendant's guilt. It is sufficient if, taking the testimony all together, the jury are satisfied beyond a reasonable ²¹⁰ doubt that the defendant is guilty." What the court doubtless intended to say was that it was not incumbent on the state to prove beyond reasonable doubt every circumstance offered in evidence and tending to establish facts essential to conviction. If so intended, it would have been a correct statement of the law. And we may go further, and say that it is not necessary that each essential fact in the chain of circumstances solely relied on to connect the accused with the commission of the offense, when separately considered, be found beyond reasonable doubt. Such a fact, though having little to sustain it when standing alone, may derive such support from others immediately connected therewith as to exclude all doubt of its existence. Nevertheless, if

conviction depends entirely on different circumstances, arranged linkwise, connecting the defendant with the crime charged, then each and every one of these must be established beyond a reasonable doubt; for no chain can be stronger than its weakest link: *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 711; *People v. Phipps*, 39 Cal. 333; *Crow v. State*, 33 Tex. Cr. Rep. 264; 2 *Thompson on Trials*, 2511; *Rice on Evidence*, 766; *People v. Aikin*, 66 Mich. 460, 11 Am. St. Rep. 512; *Kollock v. State*, 88 Wis. 663. Not so, however, with the minor circumstances relied on by the state to establish the ultimate and essential facts upon which conviction depends. Some of these may fail of proof, and yet those essential to conviction be found from other evidence beyond reasonable doubt. But the linked arrangement of fact to fact, in cases of circumstantial evidence, is not always discernible. A guilty person is quite as frequently hemmed in by a throng of circumstances. As said in *Leonard v. Territory*, 2 Wash. Ter. 381: "Release from a chain comes when the weakest link gives away, but escape from a crowd does not necessarily depend on the presence or absence of one or another, or even, perhaps, the greatest number, of the individuals composing it." ²¹¹ If the jury could only have understood, from the phrase "link in the chain of circumstances" that such fact or circumstance was referred to as might tend to establish the ultimate facts and circumstances upon which conviction depended, then, though not approving of the use of metaphors in instructions, an exception would not be well founded. But the connection in which it was used does not require that construction, and we deem it the more likely to have been thought by the jury to refer to facts or circumstances essential to conviction, and which, according to all the authorities and sound reasoning, must be established beyond reasonable doubt. This instruction has been repeatedly condemned as erroneous by other courts: *State v. Furney*, 41 Kan. 115, 13 Am. St. Rep. 262; *State v. Gleim*, 17 Mont. 17, 52 Am. St. Rep. 655; *Marion v. State*, 20 Neb. 233, 57 Am. Rep. 825; *Graves v. People*, 18 Colo. 170; *Leonard v. Territory*, 2 Wash. Ter. 381; *People v. Aikin*, 66 Mich. 460, 11 Am. St. Rep. 512; *Clair v. People*, 9 Colo. 122. The reasoning in the last case is so concisely and perspicuously stated that we quote with approval: "This figure of speech may, perhaps, be correctly applied to the ultimate and essential facts necessary to conviction in criminal cases, since if one be omitted or be not proven beyond reasonable doubt an acquittal must follow. It is not true,

however, that each and every of the minor circumstances introduced to sustain these ultimate facts must be proven with the same degree of certainty. Some of these circumstances may fail of proof altogether, and be discarded from consideration by the jury, yet the ultimate fact to establish which they were presented may be shown beyond a reasonable doubt. The evidence in cases similar to the one before us has been more aptly likened to a cable. One, two, or a half dozen strands may part, yet the cable still remain so strong that there is scarcely a possibility of its breaking. . . . It is true, in a sense, that every circumstance, however trivial, offered by the state in evidence is relied upon; but it is true, in a ²¹² broader sense that the state relies upon the ultimate facts or circumstances, the establishment of which is absolutely essential to conviction. We deem it quite as reasonable to suppose that the jury misunderstood and misapplied the language used, as that they comprehended its appropriate meaning and application." The supreme court of Illinois seem to have approved the instruction in *Bressler v. People*, 117 Ill. 422, when first before it, but on reconsideration it was pronounced inaccurate, though held to have done no harm. The charge was larceny of a note from a justice of the peace named Smith. The defendant testified that he paid it, and Smith thereupon delivered it to him, while the latter swore it had never been paid, and was not delivered. Circumstances were then proven tending to support the testimony of each, and this evidence is that to which the instruction must have been applied; that is, as said by the court, "only evidentiary facts tending to corroborate other evidence." In *Bradshaw v. State*, 17 Neb. 147, the instruction was held, in view of others not set out, not to refer to matters essential to be found in order to convict. Here the error is emphasized by repetition, in substance, though in different language, in the eighteenth paragraph of the charge; and by none is its meaning limited or explained. In *State v. Hayden*, 45 Iowa, 17, the following instruction was held to have been properly refused: "As the evidence in the case is wholly circumstantial, you must be satisfied beyond reasonable doubt of each necessary link in the chain of circumstances to establish the defendant's guilt." Such a metaphor, as we have seen, is not accurate, and is calculated to confuse, rather than enlighten, a jury. Nor should the jury be required to pass on each fact separately, though absolutely essential to conviction. On these grounds, and the further one that the rights of the

accused were fully protected by the instruction given, the decision in that case may securely rest. It is there said: "It is not a ²¹³ reasonable doubt of any one proposition of fact in the case which entitles to an acquittal. It is a reasonable doubt of guilt, arising upon a consideration of all the evidence in the case." This is no more than stating the rule that the facts should not be isolated and separately passed upon, but that all must be considered together in determining the main issue. This fully appears from subsequent cases. In *State v. Stewart*, 52 Iowa, 285, an instruction was condemned which advised the jury that it would be sufficient if one of the material averments of the indictment were "fully and clearly proven." In *State v. Hennessy*, 55 Iowa, 301, the court did not instruct that certain facts must be established beyond reasonable doubt, and it is said: "If the jury, in considering the whole case, have reasonable doubt upon any essential ingredient of the offense, this entitles a defendant to an acquittal, because it generates a doubt of guilt; and the general instruction upon reasonable doubt which is usually given need not be repeated in each instruction which relates to the facts of the case." In *State v. Clark*, 102 Iowa, 691, an instruction authorizing the jury to base the finding of certain facts on a preponderance of the evidence was held erroneous, though in another portion of the charge the court directed that all the material allegations of the indictment must be established beyond reasonable doubt. An examination of these cases demonstrates that this court has gone no further than to hold that the jury should not be required to pass on the essential facts separately, and that the general instruction with reference to the finding of guilt beyond reasonable doubt is sufficient: See *Tompkins v. State*, 32 Ala. 569.

2. Nor can we approve the fifth instruction as a safe definition of reasonable doubt: "By 'a reasonable doubt,' as herein instructed, is meant a doubt such as a reasonable man might entertain, after a careful review of all the evidence in the case, as to the guilt of the defendant. In a legal sense, a reasonable doubt is one which has some reason for its basis. It does not mean a doubt from mere caprice or groundless conjecture. A reasonable ²¹⁴ doubt is such a doubt as the jury are able to give a reason for." The last clause is the one to which exception is taken. Who shall determine whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction another may demand

his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached: *Siberry v. State*, 133 Ind. 677; *Cowan v. State*, 22 Neb. 519; *Morgan v. State*, 48 Ohio St. 371; *Carr v. State*, 23 Neb. 749. In *People v. Stubenvoll*, 62 Mich. 329, a similar instruction was disapproved, but it was held, in view of the rule of that state, dispensing with any definition of the term, of no practical consequence in the case. We are still quite content with the definition contained in *State v. Ostrander*, 18 Iowa, 435, and the long line of cases following it.

3. A copy of a copy of an insurance policy covering the burned property was received in evidence over appellant's objection, after his failure, on due notice, to produce the original. No reason appears for not introducing the copy made from the original, and, in the absence of some showing for such omission, it was error to receive a copy made of the copy therefrom: See *Drumm v. Cessnum*, 58 Kan. 331; *Winn v. Patterson*, 9 Pet. 663.

4. We discover no other error assigned likely to arise on another trial. The instructions held to be erroneous were taken from Sackett's Instructions to Jurors. They derive no support from any of the cases in courts of last resort there cited.

Reversed.

CIRCUMSTANTIAL EVIDENCE—ESSENTIAL FACTS—PROOF.—To warrant a conviction where the state relies upon a single chain of circumstantial evidence, each essential fact in the chain must be found by the jury to be true beyond a reasonable doubt: *State v. Furney*, 41 Kan. 115, 13 Am. St. Rep. 262. Each necessary link in the chain must be so proved: *People v. Aikin*, 63 Mich. 460, 11 Am. St. Rep. 512; note to *Carlton v. People*, 41 Am. St. Rep. 354.

CIRCUMSTANTIAL EVIDENCE—COLLATERAL MATTERS—PROOF.—To justify a conviction on circumstantial evidence every fact necessary to the conclusion must be distinctly and independently proved by competent evidence; but a failure of proof of some collateral circumstance not necessary to the conclusion, but offered by way of corroboration, does not destroy the chain: *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 711.

CIRCUMSTANTIAL EVIDENCE—INSTRUCTION—WHEN ERRONEOUS.—An instruction in a criminal case that, in order to warrant a conviction, the jury need not be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied

upon to establish the defendant's guilt, and that it is sufficient if, taking all the testimony together, they are satisfied beyond a reasonable doubt that the defendant is guilty, is erroneous, and prejudicial to his rights. If circumstantial evidence alone is relied upon, each fact and circumstance to complete the chain must be proved beyond a reasonable doubt: *State v. Gleim*, 17 Mont. 17, 52 Am. St. Rep. 655.

CIRCUMSTANTIAL EVIDENCE—CONSISTENCY OF FACTS. Each fact, in a chain of circumstances relied upon for a conviction in a criminal case, from which the main fact is to be inferred must be proved by competent evidence beyond a reasonable doubt, and the facts constituting such chain must be consistent with each other and with the main fact: Note to *Commonwealth v. Webster*, 52 Am. Dec. 737. Compare *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50.

INSTRUCTION ON "REASONABLE DOUBT"—WHEN ERRONEOUS.—To instruct a jury that a reasonable doubt is one for which a reason, derived from the testimony or want of evidence, can be given, is, according to some authorities, bad, but approved by others: See monographic note to *Burt v. State*, 48 Am. St. Rep. 574, on reasonable doubt.

SECONDARY EVIDENCE OF THE CONTENTS OF A CONTRACT, such as a policy of insurance, is not admissible unless the failure to produce the paper itself is accounted for: *Phenix Assur. Co. v. McAuthor*, 116 Ala. 659, 67 Am. St. Rep. 154; *Memphis etc. R. R. Co. v. Benson*, 85 Tenn. 627, 4 Am. St. Rep. 776.

CLARK v. VAN LOON.

[108 Iowa, 250.]

AN APPEAL FROM THE VERDICT OF A JURY is not allowable.

APPEAL—INTERMEDIATE ORDERS.—An order directing a verdict is appealable, under a statute allowing an appeal from an intermediate order which involves the merits, or which materially affects the final decision.

APPEAL FROM ORDER DIRECTING A VERDICT.—If a notice states that the appeal is taken from "the findings and judgment" of the trial court, but the record fails to show that a judgment was rendered on the verdict, the appeal will be treated as one from an order directing a verdict.

LIMITATIONS OF ACTIONS—KNOWLEDGE OF FRAUD. The law does not contemplate actual knowledge of a fraud before the statute of limitations begins to run, but such knowledge or notice as would lead a man of reasonable prudence to make inquiries which would disclose the fraud.

LIMITATIONS OF ACTIONS—KNOWLEDGE OF FRAUD—RECORD OF DEED.—If the facts which a record of a deed shows, with other facts known, are of a character to suggest fraud, persons interested must be charged with the knowledge which inquiry made with reasonable diligence would disclose.

LIMITATIONS OF ACTIONS—RECOVERING VALUE OF LAND FRAUDULENTLY CONVEYED—DEED OF RECORD.—Under a statute which declares that an action for relief on the

ground of fraud must be brought within five years after the cause of action accrues, an action to recover the value of land, at one time held by the defendant as security for the payment of money but which he fraudulently conveyed, is barred by the statute of limitations after the expiration of five years from the time that the deed was put upon record, although the plaintiff is a non-resident of the state and did not have actual notice of the fraud.

Action to recover the value of an interest in land, alleged to have been owned by the plaintiff, but which the defendant conveyed to a third person. A verdict for the defendant was returned by direction of the court, and the plaintiff appealed.

J. M. Greenman and L. A. Riley, for the appellant.

D. N. Sprague and Hale & Hale, for the appellee.

²⁵¹ ROBINSON, C. J. The petition alleges that on the twentieth day of August, 1880, the plaintiff was the owner of a tract of eighty acres of land, which is described, but that the record title thereto was held by his brother, J. B. Clark; that on the date specified the defendant held two notes which the plaintiff had indorsed, and the payment of which he had guaranteed; that for the purpose of securing the payment of the note the plaintiff and the defendant agreed with each other that the plaintiff should cause J. B. Clark and his wife to convey the land to the defendant, to be held by her as security for the payment of the notes and taxes on the land, which it was agreed she should pay, and that the defendant ²⁵² should convey the land to the plaintiff, whenever he should desire to sell it, upon payment by him of the amount for which it should be held as security, and that she would not convey it to anyone else; that the land was conveyed to the defendant pursuant to that agreement; that on the thirtieth day of June, 1887, she fraudulently, and with intent to cheat and defraud the plaintiff, conveyed the land for the consideration of one thousand dollars to one A. W. Van Loon, and fraudulently concealed from the plaintiff her conduct and actions in the matter; that afterward, and before the thirty-first day of March, 1892, her grantee conveyed the land to other parties; that on the date last specified the plaintiff notified the defendant that he desired to sell the land, and requested her to send him a deed therefor, with a statement of the amount due her on account of notes and taxes; that she thereupon executed a quitclaim deed for the land to the plaintiff, and forwarded it, with the notes and tax receipts to a bank in Austin, Minnesota, for the delivery of the deed on the payment of the amount due on the notes and for

taxes paid; that at that time the plaintiff first ascertained that the taxes for the years 1888 to 1891, inclusive, had not been paid, and upon investigation learned that the land had been conveyed as stated. He asks judgment for twelve hundred and ninety dollars, with interest and costs. The answer admits the conveyances, alleges that the defendant paid full consideration for the one to her, denies the alleged fraud, denies that she ever knowingly sent any deed to the plaintiff, and avers that she acted in good faith in all that she did. The answer also avers that the plaintiff's alleged cause of action is barred by the statute of limitations.

1. The notice of appeal is set out in the record, and states that the appeal is taken from "the findings and judgment" of the trial court, but the record fails to show that a judgment was rendered on the verdict. An appeal from the verdict of a jury is not allowed: *Jones v. Givens*, 77 Iowa, 173. See, also, *Boyce v. Wabash Ry. & Co.*, 63 Iowa, 70, 50 Am. Rep. 730. But the statute provides that an appeal may be taken from an intermediate order involving the merits or materially affecting the final decision. The action of the trial court in sustaining the motion to direct a verdict and in directing a verdict constituted such orders; and, treating the appeal as from them, we proceed to consider the only questions presented which we find it necessary to determine.

2. The evidence tends strongly to sustain the averments of the petition. It is shown, however, that the deed of the defendant to Van Loon purported to be an absolute conveyance of the land, and that it was recorded on the second day of July, 1887. This action was commenced in August, 1895, about fifteen years after the alleged agreement with the defendant, and the conveyance to her were made, and a little more than eight years after her deed to Van Loon was recorded. The execution of the last-named deed was, in effect, a disavowal of the alleged trust for which the title to the land was held, and could not have been otherwise understood, and the statute of limitations then commenced to run, if, as claimed by plaintiff, it was not then running: *Potter v. Douglass*, 83 Iowa, 190. An action for relief on the ground of fraud must be brought within five years after the cause of action accrued to avoid the bar of the statute: Code 1873, sec. 2529, subd. 4 (Code, sec. 3447, subd. 4). We said in *Nash v. Stevens*, 96 Iowa, 616, that the law does not contemplate actual knowledge of the fraud before the statute begins to run, but such knowledge or notice as would lead

a man of reasonable prudence to make inquiries which would disclose the fraud; also that, as the recording of a deed imparts constructive notice of its contents, if the facts which a record of a deed shows, with other facts known, are of a character to suggest fraud, persons interested must be charged with the knowledge which inquiry made with reasonable diligence would disclose. What was thus said had special reference to creditors; ²⁵⁴ but we are of the opinion that it is applicable to persons interested in the land which is fraudulently conveyed by the deed which appears of record: See *Bishop v. Knowles*, 53 Iowa, 268; *Gebhard v. Sattler*, 40 Iowa, 152; *Sims v. Gray*, 93 Iowa, 38; *Mickel v. Walraven*, 92 Iowa, 423; *Hawley v. Page*, 77 Iowa, 240, 14 Am. St. Rep. 275; *Francis v. Wallace*, 77 Iowa, 373; *Laird v. Kilbourne*, 70 Iowa, 83; *Mohlis v. Trauffer*, 91 Iowa, 751. The plaintiff is a nonresident of the state, and did not have actual notice of the fraud of the defendant until April, 1892; but those facts did not prevent the running of the statute: *Bishop v. Knowles*, 53 Iowa, 268. The record of the deed was notice to the world of its contents, and had the plaintiff read it, he would have known at once that the defendant had repudiated the alleged trust. It follows that this action was barred by the statute of limitation when it was commenced. The orders of the district court in question are therefore affirmed.

LIMITATIONS OF ACTIONS—KNOWLEDGE OF FRAUD—DATE OF RECORDING FRAUDULENT CONVEYANCE.—Fraud will be deemed to have been discovered when such facts are known, either actually or constructively, as would amount to knowledge, or which would naturally suggest such inquiries as, if followed up, would lead to such knowledge: *Wright v. Davis*, 28 Neb. 479, 26 Am. St. Rep. 347. An action to set aside a fraudulent conveyance is barred in five years from the discovery of the fraud, and the fraud will be presumed to have been discovered when such conveyance was filed for record, unless the plaintiff shows that the knowledge with which he is charged by the recording of the deed was not available to him as a basis for further inquiry, which would have led to the discovery of the fraud: *Hawley v. Page*, 77 Iowa, 239, 14 Am. St. Rep. 275; *Wright v. Davis*, 28 Neb. 479, 26 Am. St. Rep. 347.

CONE v. WOOD.

[108 IOWA, 260.]

TAX SALE OF LAND ASSESSED AS ONE PARCEL BUT OWNED IN SEVERALTY—PURCHASE BY MORTGAGEE.—If land owned by two persons in severalty is taxed as one parcel, a mortgagee of one owner cannot purchase the entire parcel at a tax sale, and acquire title, so as to divest the title of the other owner.

TAX SALES—TENDER—VALID OFFER TO PAY TAXES—WHAT IS.—In a suit to quiet title, an offer, in the answer, to pay taxes due on the property is not conditional, but is absolute and unconditional, where it is averred, in the pleading, that the defendant has, at all times, been ready and willing to pay the lawful amount of the taxes, tax sales, penalties, and interest chargeable on the property, and offers and tenders to pay it to the plaintiff, or into court, at any time, and to keep the tender and offer good whenever it shall be ascertained, or on demand.

TAX SALES—VALIDITY OF—WHAT DOES NOT AFFECT. In a suit to quiet title, where the validity of tax deeds is involved, the purpose of a mortgagee in taking and assigning tax sale certificates does not go to the validity of the tax sales.

TAX SALES—PERFECTING TITLE—WHAT NECESSARY. A person who seeks to perfect his title under tax deeds must have the support of a valid tax title. Hence, the purpose of one, through whom he claims, in taking an assignment of tax sale certificates, is not material because it does not go to the validity of the tax sales.

Suit to quiet title. The main inquiry involved the validity of tax deeds. Prior to July, 1889, one D. T. Hedges owned three lots, each fifty feet by one hundred and fifty feet, lying in the southwest corner of block 64, in Pierce's addition to Sioux City, Iowa, which block was bounded on the west by Jones street and on the south by Thirty-second street. The lots as platted were numbered 17, 18, and 19, and fronted on Jones street. The east end of the lots abutted on an alley running through the block north and south. Lot 17, the south lot, lay along Thirty-second street, and lots 18 and 19 were north of it. Hedges sold the tract, but in doing so changed the frontage of the lots to Thirty-second street, so as to make them fifty feet east and west by one hundred and fifty feet north and south, but no change was made in the plat on record. In July, 1889, the east lot, according to the change made, was sold to a purchaser who executed a mortgage thereon to the Missouri, Kansas & Texas Trust Company. This mortgage was foreclosed, and on July 7, 1891, the trust company received a sheriff's deed on execution sale for the lot. On January 2, 1893, this lot was sold to the State Realty Company by the trust

company, the latter taking back a mortgage for the purchase price. The middle lot was sold by Hedges to some one else. W. H. Cox bought the west lot and gave a mortgage to secure a part of the purchase price. This mortgage was sold to the defendant Wood. The lots were assessed, for the year 1889, by their platted numbers. Each one was sold separately at a tax sale and a certificate issued therefor. The certificate for lot 19 was issued to the trust company, which, by January 7, 1891, had, through assignments, become the owner of the certificates for lots 17 and 18. The taxes for 1890, on all the lots as platted, were paid by the trust company. It also paid the taxes for 1891 and 1892 on the middle and east lots, as they fronted on Thirty-second street, but not on the west lot, owned by Cox. At a tax sale in 1892 the Cox lot was bidden in by the trust company for the taxes of 1891. In August, 1893, the trust company assigned the tax sale certificates held by it under the sale of 1890, for the taxes of 1889, to one Farrell, who received from the county treasurer separate deeds for lots 17, 18, and 19, as assessed. In pursuance of a prior agreement, Farrell, who was an officer in the trust company, conveyed the east lot to the realty company, reserving for himself the middle and west lots. Cone, the plaintiff, was secretary of the trust company and claimed the west one hundred feet of the three lots, otherwise designated as the middle and west lots. Cone derived his title through Farrell, who at first conveyed an undivided one-half of the middle and west lots to the plaintiff, and who then joined with the plaintiff in a deed of the lots to one Cooper, the latter afterward conveying the lots to Cone. In the suit by Cone one defendant alone—Wood—answered. He denied the validity of the tax deeds and offered to redeem. The deeds under which Cone claimed were held void, and the plaintiff appealed.

Taylor & Burgess, for the appellant.

Marks & Mould, for the appellee.

²⁰³ GRANGER, J. 1. There is no doubt to our minds that plaintiff stands as to his rights under the tax deeds issued to Farrell, as would the trust company were it the plaintiff asking the same relief. By this we mean that there are no intervening equities in his behalf.

The question we now consider is, Had the trust company the right to purchase at tax sale and take title to the west one-

third of lots 17, 18, and 19, being what we have called the west lot? If it had not, it is because of its interest in the east one-third of these lots because of its mortgage thereon. Throughout the case it appears that the trust company, in what it did by way of obtaining the certificates of sale and assigning, acted alone with a view to protect its interest as mortgagee. Each lot being assessed as an entirety, with no prescribed legal method of making an apportionment of the taxes levied, so as to permit it to pay its proportion on the basis of its interest, the company adopted ²⁸⁴ the expedient of protecting its interest by securing the title through the sale for taxes; that is, it adopted the plan of securing the certificates, and then disposing of them, so as to take title to itself of the east lot, or another for it, and permit another to take the title to the balance. The sales of the lots being separate, they may be regarded as separate transactions in our considerations.

That the trust company had the right to pay the taxes on the property on which it held the mortgage, see *Eck v. Swenumson*, 73 Iowa, 423, 5 Am. St. Rep. 690. The same case also announces the rule that a mortgagee cannot, by purchase at a tax sale, defeat a senior mortgage or acquire title against the mortgagor. The holdings are as to the specific land covered by the mortgage. The rule is that attempted purchases of that kind amount to a payment of the taxes, and not to a purchase. We notice these unquestioned rules, to have in mind how the relationship of mortgagee affected the trust company in what it did. Then, as to the part of the lots covered by its mortgage, it had the right to pay the taxes, and not to purchase it. But it could not do that. And here we may say that it made the attempt with the treasurer of the county and the other parties, and no apportionment could be made, because of the entire assessment of each lot. The assessment was prior to the taking of the mortgage, and the mortgage was taken with knowledge of it. We think the mortgage gave to the trust company, for the purpose of protecting its interest against tax sales, the same rights as if it had purchased the same land. We have, then, this question: Where the land is taxed as one parcel, which is owned by two in severalty, can a mortgagee of one owner purchase the entire parcel at tax sale, and acquire title so as to divest the title of the other owner? This precise question does not seem to have been settled in this state. The case nearest in point is that of *Lewis v. Ward*, 99 Ill. 525. Lewis was the owner of the north half of lot 316, and taxes be-

came due thereon. Before the tax sale Woodward became the owner of the north fifty feet, leaving ²⁰⁵ to Lewis the south twenty-five feet. Woodward, instead of paying the taxes, purchased at the tax sale the whole north half of the lot, and assigned the certificate and a deed issued thereon to one Pitts, and Ward purchased the twenty-five feet owned by Lewis from Pitts. We quote from the case as follows: "The law is well settled that certain persons, on account of their relations to the property or their obligation to pay the taxes thereon, are forbidden by the policy of the law to become purchasers of the land at a tax sale. The rule admits of no exception that a purchase by one whose duty it is to pay the taxes operates as payment, and nothing more. Where it is made to appear it was the duty of the party to pay the taxes on the lands, the disqualification at once attaches, and a purchaser will not be permitted to derive any advantage from that which it was his plain duty under the law to do. The rule on this subject is plain, and is so just that it commends itself to the common judgment as right. The only difficulty lies in the application of the rule to particular cases. It has been extended to a case where the land of the party making the purchase was taxed as one parcel with that of another and the whole sold together. That is precisely the case here. The whole of the north half of lot 316 was assessed to plaintiff. Of the north half of the lot plaintiff at the time owned twenty-five feet and Woodward owned the other fifty feet. The entire tract was sold as it was assessed, as one parcel, and was purchased by Woodward, who owned, as has been seen, two-thirds of the property sold to himself. These facts bring the case clearly within the inhibition of the principle stated. A case exactly in point is *Cooley v. Waterman*, 16 Mich. 366. In this case, as in that, the sale was entire and indivisible, and resulted from the neglect of the purchaser to pay taxes on his own land. Had the purchaser first paid his own proportion of the taxes assessed on his land, his relation to the residue of the property and the taxes would then have been that of a stranger, owing no duty to the land or the tax, and the disqualification resting upon him would have ²⁰⁶ been removed. That he did not do, but chose, for some reason, to purchase the whole tract of land for the entire amount of taxes due upon it, the largest portion of which it was his duty to pay." The case concludes with a holding that the purchase at the tax sale operated as a payment of the taxes and gave no title. Had the trust company owned the land its mort-

gage was on, we do not see why the two cases would not be alike in principle. The inhibitions of the rule apply as strongly to a mortgagee as to an owner. In the cases the inhibitions are made to depend at times on when the person has the "right" to pay the taxes, and at others when he is under an "obligation" to pay them. The distinction is not as important as it is thought to be. The words are many times interchangeable in their use. Sometimes the word "obligation" is used to denote an agreement or undertaking to pay taxes; at others, it is used in the sense of an obligation to do so to protect an interest or title, as, in one sense, the owner of land is not under obligation to pay the taxes thereon, for he may forfeit it, and yet in another sense he is under such an obligation in order to preserve his title. The same is to be said of a mortgagee whose interest requires such a payment for its protection. He must forfeit his lien or pay the taxes. The Illinois case speaks of the owner paying his proportion of taxes assessed, as if that might have been done, and we do not lose sight of the fact that, in this case, there was no defined way of doing that. But without an attempt to point out a way for doing it, which we should not do, it is to be said that, whatever was the legal requirement to discharge the taxes from the mortgaged lot, he was compelled to do, and thus relieve the land that he could not purchase at tax sale, but might pay the taxes on. If the company must pay all taxes due on a lot and take an added lien therefor, or if a proceeding might be adopted to fix its proportion, in either case we think, before it could purchase at tax sale, it must make such payment that, if it takes a title, it will not be based in part on its own default. The thought runs throughout the cases. ²⁸⁷ As more or less sustaining the rule, see *Maul v. Rider*, 51 Pa. St. 377; *Cooley v. Waterman*, 16 Mich. 366; *Manning v. Bonard*, 87 Iowa, 648; *Fair v. Brown*, 40 Iowa, 209. It is true that few of the cases involve substantially the same facts. The general rule, in all its bearing, is against the right to acquire such a title. It could not be permitted, without involving complications that should be avoided.

Appellant cites a number of cases in support of his contention, and among them that of *Oswald v. Wolf*, 129 Ill. 200, being strongest in his favor, and yet it will be seen that its facts are so different as to make it distinguishable from this case. It will be understood that it was thought to be distinguishable from *Lewis v. Ward*, 99 Ill. 525, by that court, for it followed

that case without a reference to it. *Powell v. Lantzy*, 173 Pa. St. 543, is cited by appellant. We have cited *Maul v. Rider*, 51 Pa. St. 377, from the same state as sustaining, to some extent at least, our conclusions. These cases, cited by appellant, state a rule peculiarly applicable to owners of land purchased after an encumbrance has attached, and for the discharge of which he is under no obligation arising from his acquisition of the property, and as to such he may perfect or better his title by a purchase at a tax sale. We do not see that such a rule has ever been held as to a mortgagee, and, in fact, the reasons do not exist for it. They are usually, if not always, against it. It is said, as against the defendant's claim, that he does not show that he or Cox, his mortgagor, had title to the property at the date of the tax sale, but we think the facts appear throughout the record as we have stated them.

2. It is also said that defendant did not show that he or the person under whom he claims had paid the taxes due upon the property. It is conceded that an offer in the pleadings to pay the amount due is all that is required. The answer contains an offer to pay, but it is said to be conditional, and that such an offer is not sufficient. The pleading in this respect is as follows: "That this ²⁰⁸ defendant has at all times been ready and willing to pay the just and lawful amount of said taxes, tax sales, penalties, and interest that were chargeable on said west one-third of said lots, and hereby offers and tenders the same, and offers to pay the same to the plaintiff or into court at any time, and to keep said tender and offer good whenever the same shall be ascertained or on demand." We do not regard it as conditional, but absolute and unconditional. It accords with the rule as stated in *Crawford v. Liddle*, 101 Iowa, 148.

3. It is urged that the trust company had no further connection with the tax sale certificates than that they should not be used against the east one-third of the lot; that it cannot be regarded as an actual assignee of the certificates. That the purpose of the company in taking and assigning the certificates was to protect its interest as mortgagee we have no doubt. But that fact does not affect the legal situation between plaintiff and defendant Wood. Plaintiff seeks to perfect his title against Wood, and to do that he must have the support of a valid tax title. The purpose of the company does not go to the validity of the tax sale. The terms of redemption, if defendant is entitled to redeem, as prescribed by the court are not questioned. The judgment will stand affirmed.

TAX SALES—TITLE.—A STRICT COMPLIANCE WITH THE STATUTE is essential to the validity of a tax title: Note to *Pleasants v. Scott*, 76 Am. Dec. 405; *Polk v. Rose*, 25 Md. 153, 89 Am. Dec. 773; and the purchaser must prove everything essential to the validity of his title: See monographic note to *Jackson v. Shepard*, 17 Am. Dec. 505, on recitals in tax deeds as evidence; *McGahen v. Carr*, 6 Iowa, 381, 71 Am. Dec. 421.

Who may Purchase and Enforce a Tax Title.*

General Principles—Strengthening Title.—It is a general principle that one who ought to pay the taxes on property cannot, by omitting to do so, purchase at a sale of the property for the nonpayment, and thereby strengthen his title. A purchase by one whose duty it was to pay the taxes operates as payment only, and he can derive no benefit as against a third party, by neglect of the duty which he owed to such party: *Johnston v. Smith*, 70 Ala. 108; *Jacks v. Dyer*, 31 Ark. 834; *Guynn v. McCauley*, 32 Ark. 97; *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94; *Coppinger v. Rice*, 33 Cal. 408; *Barrett v. Amerein*, 36 Cal. 322; *Garwood v. Hastings*, 38 Cal. 216; *Relly v. Lancaster*, 39 Cal. 354, 356; *Christy v. Fisher*, 58 Cal. 256; *Middletown Sav. Bank v. Bacharach*, 46 Conn. 513; *Voris v. Thomas*, 12 Ill. 442; *Busch v. Huston*, 75 Ill. 343; *Lewis v. Ward*, 99 Ill. 525; *Haskell v. Putnam*, 42 Me. 244; *Bertram v. Cook*, 32 Mich. 518; *Miller v. Williams*, 15 Gratt. 213; *Williamson v. Russell*, 18 W. Va. 612; *Gray v. Larrimore*, 4 Saw. 638, 652; 2 Abb. U. S. 542, 558. Otherwise expressed, one whose duty it is to pay the taxes upon property cannot be a purchaser thereof at a sale for taxes, for he cannot avail himself of a title growing out of his neglect of duty, and will not be allowed to obtain any title to property, by the purchase of it at a tax sale for taxes which he should have discharged or paid without a sale: *Relly v. Lancaster*, 39 Cal. 354, 356; *Garwood v. Hastings*, 38 Cal. 216; *Coppinger v. Rice*, 33 Cal. 408; *Middleton Sav. Bank v. Bacharach*, 46 Conn. 513; *Voris v. Thomas*, 12 Ill. 442; *Lewis v. Ward*, 99 Ill. 525; *Haskell v. Putnam*, 42 Me. 244; *Dubois v. Campau*, 24 Mich. 360; *Williamson v. Russell*, 18 W. Va. 612; *Gray v. Larrimore*, 4 Saw. 638, 652; 2 Abb. U. S. 542, 558. Nor can he obtain title to property on which he should have paid the taxes by allowing it to be sold therefor and buying it from a stranger who purchased it at the sale: *Coppinger v. Rice*, 33 Cal. 408; *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94; *Voris v. Thomas*, 12 Ill. 442; *Pleasants v. Scott*, 21 Ark. 870, 76 Am. Dec. 408. As said in *Christy v. Fisher*, 58 Cal. 256, 258: "One who is under a moral or legal obligation to pay the taxes is not in a position to become a purchaser at a sale made for such taxes. If such person permits the property to be sold for taxes, and buys it in, either in person or indirectly through the agency of another, he does not thereby acquire any right or title to the property, but his purchase is deemed one mode of paying the taxes." A per-

*REFERENCE TO MONOGRAPHIC NOTES.

Who may purchase at a tax sale: 15 Am. Dec. 684-690.

son may also so conduct himself with respect to land as to be estopped from purchasing it at a tax sale. Thus, if the title, both legal and equitable, is in the government of the United States, but the land, though not taxable, is assessed to an "unknown owner," and is purchased by one at a tax sale, who causes the assessment on which the void sale was made to be changed, substituting his own name as owner on the roll for that of "unknown owner," and the land having become taxable, is assessed to him on the next new assessment, such purchaser is estopped from purchasing at a subsequent tax sale made on the new assessment: *Smith v. Cassidy*, 75 Miss. 916. Successive purchases of the same property, at different sales thereof, for delinquent taxes, do not operate to strengthen the title first acquired: *Lacey v. Davis*, 4 Mich. 140, 66 Am. Dec. 524.

On the other hand, to preclude a person from acquiring a tax title, he must be under some legal or moral obligation to pay the tax, or there must be something in his contract or fiduciary relation to the owner of the property which renders it inequitable, as between them, that he should acquire the title: *Laton v. Balcom*, 64 N. H. 92, 10 Am. St. Rep. 381. It is a familiar rule that one who is under no obligation to pay taxes for which a sale was made is not precluded from acquiring a tax title to the property sold: *Seymour v. Harrison*, 85 Iowa, 130, 135; *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94; *Atkinson v. Dixon*, 89 Mo. 464; and the fact that lands are assessed to and sold in the name of a particular person does not preclude his purchase of them at a tax sale, and acquiring title thereto, if the taxes were illegally assessed to him, and he is under no legal obligation to pay them: *Pleasants v. Scott*, 21 Ark. 370, 76 Am. Dec. 403; but the fact that a tax deed should be received as evidence of title, where the only objection to its regularity is that the person to whom the land was assessed became the purchaser, does not preclude the objecting party from afterward showing that the purchaser occupied such a position as required him to pay the taxes: *Pleasants v. Scott*, 21 Ark. 370, 76 Am. Dec. 403. A party who has been relieved by agreement, of all duty or obligation to pay taxes, past or future, on premises, is not debarred from acquiring a valid tax title to the property by reason of his former relation to it: *Shoup v. Central Branch etc. R. R. Co.*, 24 Kan. 547; and a person who holds a defective title to property may perfect the same by purchase at a tax sale, if he stands in no relation of trust to, and is implicated in no fraud against, the owner: *Coxe v. Gibson*, 27 Pa. St. 160, 67 Am. Dec. 454. Any person who has no interest in property sold at a tax sale, and who is under no obligation to pay the taxes thereon, may become a purchaser at such sale. Hence, possession under a deed conveying no title does not disqualify the grantee from becoming a purchaser of the property, if it is sold at a tax sale: *Curtis v. Smith*, 42 Iowa, 665. A person who holds the naked legal title to land in trust for another, but who has no actual ownership or

other valid interest therein, is under no obligation to pay the taxes therein. Hence, if he is required to quitclaim the property to the real owner, he may purchase outstanding tax sale certificates issued against the land while he or his grantors held the mere naked legal title, and may thereby acquire title to the property as against its real owner: *Seymour v. Harrison*, 85 Iowa, 130. A person holding a quitclaim deed to land previously conveyed does not, ipso facto, become a trustee for the grantees in the former conveyance, and may purchase the property at a tax sale: *Curtis v. Smith*, 42 Iowa, 665. One who is under no legal or moral obligation to pay taxes is not precluded from purchasing at the tax sale, although in possession at the time the assessment was made, or when the land was sold: *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94. An invalid assessment constitutes no charge upon land, and no legal obligation is thereby imposed upon anyone to pay the taxes: *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94. The holder of a tax title is not barred by the statute of limitations from enforcing his claim where the holder of the fee has made a written surrender and attornment to him before the statute has run: *Gallaher v. Head*, 108 Iowa, 588, 590.

Administrator's Sale.—A Purchaser at an administrator's sale cannot acquire a tax title so as to cut off a prior mortgage: *Edgerton v. Schneider*, 26 Wis. 385.

Adverse Claimants.—One in adverse possession of land does not impair his right to rely upon the statute relating to adverse possession by purchasing the land at a tax sale and taking and recording a tax deed: *Oldig v. Fisk*, 53 Neb. 156, 159. If, however, a tax is levied on land and the occupant takes a tax deed to himself, this act is presumptively inconsistent with any previous claim of title made by him, and, where there is no evidence that his previous entry or occupation was under color or claim of title, it will be presumed that he was a mere intruder, and, as such, capable of acquiring adverse title by a tax deed or other conveyance to himself. Hence, if he entered and occupied the land as a mere intruder, and recorded a tax deed thereof running to himself, this is equivalent to a new entry, under claim of title, and his possession thenceforth is adverse: *Link v. Doerfer*, 42 Wis. 391, 24 Am. Rep. 417. That a tax deed, regular in form, is color of title, see *Taylor v. Hamilton*, 173 Ill. 392; *Duck Island Club v. Bexstead*, 174 Ill. 435. See subdivision, "Cotenants," *infra*.

Agents.—An agent, whose duty it is to pay the taxes, cannot become a purchaser for himself of his principal's land at a tax sale: *Lamborn v. County Commrs.*, 97 U. S. 181, 184; *Carithers v. Weaver*, 7 Kan. 110, 123; *Krutz v. Fisher*, 8 Kan. 90; *Barton v. Moss*, 32 Ill. 50; *Gonzalla v. Bartelsman*, 143 Ill. 634; *Oldhams v. Jones*, 5 B. Mon. 458, 467; *Schedda v. Sawyer*, 4 McLean, 181; *Curtis v. Borland*, 85 W. Va. 124; *Maxfield v. Willey*, 46 Mich. 252; *Linsley v. Sinclair*, 24 Mich. 380; *Murdoch v. Milner*, 84 Mo. 96; *Franks v.*

Morris, 9 W. Va. 664; McMahon v. McGraw, 26 Wis. 614; Baker v. Whiting, 3 Sum. 475. He cannot, by a purchase of a tax sale certificate, make himself the owner of such land as against his principal; nor can he become its purchaser at a sale for taxes, without a previous and explicit renunciation of his agency: Murdoch v. Milner, 84 Mo. 96; Edgerton v. Schneider, 26 Wis. 385. A purchase of land, upon its sale for taxes, by the agent of one who was in possession of it, either by himself or his tenants, does not pass or otherwise affect the title to it: Bernal v. Lynch, 36 Cal. 135; Gonzalia v. Bartelsman, 143 Ill. 634. It is held in Morris v. Joseph, 1 W. Va. 256, 91 Am. Dec. 386, that an agent cannot acquire title to land of his principal at a tax sale for a delinquency which occurred while the agent had control, although the fiduciary relation may have ceased at the time of the sale.

An agent having charge of "unseated" lands cannot purchase them at a sale for taxes, without a previous explicit renunciation of his agency: Bartholemew v. Leech, 7 Watts, 472; neither can an agent acquire a tax title to lands, as against his principal, on the ground that the principal has failed to remit funds with which to pay the taxes, without notice to his principal and a distinct renunciation of his agency: McMahon v. McGraw, 26 Wis. 614; Bowman v. Officer, 53 Iowa, 640. Nor can an agent purchase his principal's land, at a tax sale, with the latter's money: Barton v. Moss, 32 Ill. 50; Young v. Goodhue, 106 Iowa, 447. And an agent, who has money belonging to his principal with which to pay the taxes on property, cannot, by neglecting to make such payment, acquire a valid tax title on the premises, as against his principal: Young v. Goodhue, 106 Iowa, 447. An agent, employed by the owner to bid off land when sold for taxes, cannot, by taking the deed in his own name, acquire title in himself: Matthews v. Light, 32 Me. 305; Franks v. Morris, 9 W. Va. 664; Linsley v. Sinclair, 24 Mich. 380. If an agent, having charge of lands for another, attempts to acquire a tax title thereto, or if he, under other circumstances, attempts to acquire a tax title to the land of his principal by allowing it to be sold for taxes, he will hold such title as a trustee for his principal: Krutz v. Fisher, 8 Kan. 90; Fisher v. Krutz, 9 Kan. 501; Oldhams v. Jones, 5 B. Mon. 458, 467; Gonzalia v. Bartelsman, 143 Ill. 634; Curtis v. Borland, 35 W. Va. 124; Baker v. Whiting, 3 Sum. 476; Schedda v. Sawyer, 4 McLean, 181; particularly where the purchase at the tax sale was made with the funds of the principal: Brown v. Dwelley, 45 Me. 52; Barton v. Moss, 32 Ill. 50; Ward v. Armstrong, 84 Ill. 151. Compare Shay v. McNamara, 54 Cal. 169. A purchaser who buys at a tax sale cannot, through the neglect of a principal's agent, who has been furnished with money to pay taxes, obtain a valid tax title to the principal's property by purchasing through such agent: Young v. Goodhue, 106 Iowa, 447; and the fact that an agent at a tax sale purchases land upon which he holds a mortgage, and is therefore entitled to pay the taxes, does not invalidate his principal's title acquired by such purchase:

Jury v. Day, 54 Iowa, 573. If an agent, whose duty is to collect rents and to pay taxes on land, has rents in his hands sufficient to pay the taxes, but allows the land to be sold therefor, and takes the tax certificates in his own name, it amounts to a payment of the taxes and a redemption of the certificates from the tax sale. He does not, therefore, acquire any valid title as against the principal, and the same result would follow if the agent should buy at the tax sale as agent for his own wife, and in her name, for she would be chargeable with notice of the fraud: *Fox v. Zimmermann*, 77 Wis. 414. So, if a married man purchases at an administrator's sale for his wife, as her agent, and a tax deed is subsequently made to him, a court will assume that he took the deed as her agent, and hold it invalid as against a prior mortgagee, where there was no reservation or exception in the deed, and the sale was made without any mention of the mortgage in the proceedings: *Edgerton v. Schneider*, 26 Wis. 385. A party charged with the payment of taxes, as agent, cannot acquire a tax title to his principal's land, whether he makes a purchase of it himself at a tax sale, or secures an assignment to himself of a certificate of purchase obtained by another; nor can he, by assigning his certificates, confer upon his assignee any greater rights than those possessed by himself: *Ellsworth v. Cordrey*, 63 Iowa, 675. But where an agent acquires the legal title to his principal's land at a tax sale, it has been held that a purchaser from him in good faith and for value will be protected against the equities of the principal: *Lamb v. Davis*, 74 Iowa, 719; and while the agent cannot acquire a tax title to land, as against his principal, yet the agent's purchase is not void, but voidable only. Hence, before the principal can redeem from the agent, or his assignee to whom a deed has been made, and who has paid the subsequent taxes, he must pay on account of such subsequent taxes the same amount which he would have to pay if the taxes had not been paid by the tax title claimant: *Ellsworth v. Cordrey*, 63 Iowa, 675, 679. One who volunteers to pay taxes with his own money for a nonresident owner, expecting to be reimbursed upon request, is not, however, the agent of the owner for the payment of taxes, and if the owner neglects, upon request, to reimburse such volunteer, the latter has the same right as any other person to bid in the land for subsequent unpaid taxes, and to take a deed, without being liable to account to the owner for the land or its proceeds: *Lamb v. Davis*, 74 Iowa, 719.

Attorneys.—A purchase of land at a tax sale by the owner's attorney operates only as a payment of the taxes, and the purchaser acquires no rights, as against the owner, by neglecting his duty to purchase in the land for the latter, and buying it for himself: *Curtis v. Borland*, 35 W. Va. 124. If an attorney has been retained in regard to land, his purchase thereof, at a tax sale, is not consistent with his relation to his client, and has been held to be unauthorized without any showing of bad faith on his part: *Wright v.*

Walker, 30 Ark. 44. So, if an attorney is employed to purchase tax titles as agent for his client, who has a defective title of record and who wishes to strengthen it by such purchase, and the attorney, with his client's means, fraudulently takes the title in his own name, for the purpose of converting it to his own use in violation of the confidence reposed in him, and conveys to a third person, the defrauded client has an equitable claim to relief, for the property, in equity, belongs to him: *Linsley v. Sinclair*, 24 Mich. 380. But the mere fact that a purchaser of land at a tax sale was, during the life of the deceased owner, his attorney in certain suits, does not affect his right to purchase, as such relation did not impose upon him the duty of paying the taxes or redeeming the land: *Pack v. Crawford*, 29 Ark. 489. So, if a client refuses for several years to pay his attorney for services rendered and expenses incurred in a foreclosure suit, and the mortgaged land is afterward purchased by the attorney at a tax sale to prevent the title passing into the hands of others, but the client, upon being informed of the sale, fails to pay the amount advanced, the latter will not be permitted, after the lapse of seven years, to maintain an action to set aside the tax deed, for an attorney has rights as well as the client: *Eckrote v. Myers*, 41 Iowa, 324.

City, County, or State.—With respect to tax sales, it is not an uncommon statutory provision that, if no bidders offer to take the land and pay the tax, it shall be bid in for the state, county, or municipality, as the case may be. Thus, under the charter of the city of Elizabeth, in the state of New Jersey, lands, if not bid for at a public sale for taxes, shall be struck off to the city for the term of fifty years: *Schatt v. Grosch*, 31 N. J. Eq. 199; *Ludington v. Elizabeth*, 34 N. J. Eq. 357; *In re Commissioners*, 49 N. J. L. 488; *Morgan v. Comptroller of Elizabeth*, 44 N. J. L. 571. The city of Jefferson, in the state of Missouri, had power it seems, under its charter of 1872, to buy in land sold at execution sale for taxes due the city: *Jefferson v. Curry*, 71 Mo. 85; Acts of 1872, p. 390, sec. 1. A municipal corporation, however, in the sale and conveyance of land for taxes, can exercise only such authority as has been expressly given by statute. It cannot, therefore, purchase land at a tax sale without express statutory authority: *Knox v. Peterson*, 21 Wis. 247; *Sprague v. Coenen*, 30 Wis. 209; *Logansport v. Humphrey*, 34 Ind. 467. In *Champaign v. Harmon*, 98 Ill. 491, it is held that the general power of a city to buy and hold real estate does not authorize it to purchase property at a tax sale. A city having power under its charter to purchase property can purchase for governmental purposes only, but its purchase for taxes is for a governmental purpose: *Keller v. Wilson*, 90 Ky. 350.

In Nebraska, county commissioners may purchase at all tax sales, public or private, for the use and benefit of the county lands which are offered and remain unsold for want of bidders: *Shelley v. Towle*, 16 Neb. 194; *Otoe County v. Brown*, 16 Neb. 394; *Otoe v. Mathews*, 18 Neb. 466; *State v. Cain*, 18 Neb. 635; *County of Lan-*

caster v. Trimble, 34 Neb. 752. In Kansas, a county is not permitted to compete with individuals as a voluntary bidder, and can only become the involuntary purchaser when the land cannot otherwise be sold for the amount due: Norton v. Friend, 18 Kan. 532, 538; Magill v. Martin, 14 Kan. 67; Babbitt v. Johnson, 15 Kan. 252; Bryson v. Spaulding, 20 Kan. 427; Larkin v. Wilson, 28 Kan. 513; Mack v. Price, 35 Kan. 184. Compare Morrill v. Douglass, 17 Kan. 291. In Pennsylvania, the county commissioners may bid in lands sold for the nonpayment of taxes: Township of Rush v. Schuylkill County, 100 Pa. St. 356; Russell v. Reed, 27 Pa. St. 166. A county in Wisconsin may also purchase land at a tax sale, but there is no authority, under the laws of that state, for it to make such a purchase jointly with another person: Sprague v. Coenen, 30 Wis. 209. The statute of Illinois, authorizing suit to be brought for delinquent taxes in the name of the people, or in the name of the proper county, authorizes a county to purchase under the judgment: Douthett v. Kettle, 104 Ill. 356; but the Iowa code of 1851 did not authorize counties to purchase at tax sales: Bruck v. Broesigks, 18 Iowa, 393. And a county cannot, for the use of the school fund, buy in an outstanding tax title, to defeat the lien of a mortgage, prior to another mortgage, which exists on the same land, in favor of the fund: Miller v. Gregg, 26 Iowa, 75.

Lands sold for the nonpayment of taxes may also be bid in for the use of the state. In other words, the state may become a purchaser: State v. Brewer, 64 Ala. 287; Doe v. Bryan, 2 Hawks, 17; Avery v. Rose, 4 Dev. 549; but the state will not allow a sheriff to buy for her, or to bid in land in the name of the governor: Love v. Willbourn, 5 Ired. 344, 347; and the state acquires no title by the sale of real estate to a city for city taxes: Stieff v. Hartwell, 35 Fla. 606. The state of Louisiana is not prohibited, by its laws, from purchasing at tax sales: Martinez v. State Tax Collectors, 42 La. Ann. 677, 679; Breaux v. Negretto, 43 La. Ann. 426; Smith v. New Orleans, 43 La. Ann. 726; and in Virginia, commissioners making a sale of land for taxes, under the act of Congress of February 6, 1863, providing for the collection of direct taxes in insurrectionary districts within the United States, were required, unless certain conditions were complied with, to bid off the land for the United States: Turner v. Smith, 18 Gratt. 830. In some of the states, it is provided by statute that, if the lands cannot be sold for want of bidders, they shall be declared forfeited to the state, but there can be no forfeiture, in such cases, unless the lands are exposed for sale according to law, and cannot be sold for want of bidders: State v. Thompson, 18 S. C. 538; Owens v. Owens, 25 S. C. 155; Woodward v. Sloan, 27 Ohio St. 592; Magruder v. Esmay, 35 Ohio St. 221; Biggins v. People, 106 Ill. 270; Gillfillan v. Chatterton, 38 Minn. 335; Mulvey v. Tozer, 40 Minn. 384.

Cotenants.—One tenant in common cannot, as against his cotenant, acquire a valid tax title to the land owned in common: Funson v.

Bradt, 105 Iowa, 471; Cocks v. Simmons, 55 Ark. 104, 29 Am. St. Rep. 28; Mills v. Tukey, 22 Cal. 373, 83 Am. Dec. 74; Hannig v. Mueller, 82 Wis. 235; Fryer v. Magill, 163 Pa. St. 340; Weare v. Van Meter, 42 Iowa, 128, 20 Am. Rep. 616; Donnor v. Quartermaa, 90 Ala. 164, 24 Am. St. Rep. 778; Burgett v. Williford, 56 Ark. 187, 85 Am. St. Rep. 96; Administrators v. Smith, 38 Vt. 464; Maul v. Rider, 51 Pa. St. 377; Tice v. Derby, 59 Iowa, 312; Allen v. Poole, 54 Miss. 323; Harrison v. Harrison, 56 Miss. 174; Muthersbaugh v. Burke, 33 Kan. 260; Barker v. Jones, 62 N. H. 497, 13 Am. St. Rep. 586; Fling v. McKinley, 44 Iowa, 68; Shell v. Walker, 54 Iowa, 386; Conn v. Conn, 58 Iowa, 747; Smith v. Smith, 68 Iowa, 608; Clark v. Brown, 70 Iowa, 139; Butler v. Porter, 13 Mich. 292; Dubois v. Campau, 24 Mich. 360; Holterhoff v. Mead, 36 Minn. 42; either by purchasing the land of the cotenancy at a tax sale himself: Thompson v. McCorkle, 136 Ind. 484, 43 Am. St. Rep. 334; Donnor v. Quartermaa, 90 Ala. 164, 24 Am. St. Rep. 778; Cocks v. Simmons, 55 Ark. 104, 29 Am. St. Rep. 28; Wise v. Hyatt, 68 Miss. 714; Page v. Webster, 8 Mich. 263, 77 Am. Dec. 446; Johns v. Johns, 93 Ala. 239; Administrators v. Smith, 38 Vt. 464; Brown v. Hogle, 30 Ill. 119; Battin v. Woods, 27 W. Va. 58; Davis v. King, 87 Pa. St. 261; Burhans v. Van Zandt, 7 N. Y. 523; Delashmutt v. Parrent, 39 Kan. 548; Bender v. Stewart, 75 Ind. 88, 91; Butler v. Porter, 13 Mich. 292; Dubois v. Campau, 24 Mich. 360; Emeric v. Alvarado, 90 Cal. 444; Austin v. Barrett, 44 Iowa, 488; or by buying from a stranger, who purchased at the sale: Emeric v. Alvarado, 90 Cal. 444; Dubois v. Campau, 24 Mich. 360; Battin v. Woods, 27 W. Va. 58; or by purchasing an outstanding tax title to the land for the purpose of depriving his cotenants of their interest in it: Tanney v. Tanney, 159 Pa. St. 277, 39 Am. St. Rep. 678; Mills v. Tukey, 22 Cal. 373, 83 Am. Dec. 74; Lloyd v. Lynch, 28 Pa. St. 419, 70 Am. Dec. 137; Bracken v. Cooper, 80 Ill. 221; Barker v. Jones, 62 N. H. 497, 13 Am. St. Rep. 586.

A purchase, by a tenant in common, of the common property at a tax sale amounts only to a payment of the tax: Hannig v. Mueller, 82 Wis. 236; Bracken v. Cooper, 80 Ill. 221; Muthersbaugh v. Burke, 33 Kan. 260; Delashmutt v. Parrent, 39 Kan. 548; Bender v. Stewart, 75 Ind. 88, 91; Dubois v. Campau, 24 Mich. 360; or to a redemption from the sale, if the tax certificate is purchased from a stranger: Bender v. Stewart, 75 Ind. 88, 91; Maul v. Rider, 51 Pa. St. 377; Battin v. Woods, 27 W. Va. 58; Holterhoff v. Mead, 36 Minn. 42; Cecil v. Clark, 44 W. Va. 659, 682; Clark v. Rainey, 72 Miss. 151. Such a purchaser is regarded as the trustee of his cotenants, holding the tax title for their benefit: Weare v. Van Meter, 42 Iowa, 128, 20 Am. Rep. 616; Fallon v. Chidester, 46 Iowa, 588, 26 Am. Rep. 164; Johns v. Johns, 93 Ala. 239; Baker v. Whiting, 3 Sum. 475; Frentz v. Klotsch, 28 Wis. 312; Fox v. Coon, 64 Miss. 465; Phipps v. Phipps, 39 Kan. 495; Administrators v. Smith, 38 Vt. 464; Maul v. Rider, 51 Pa. St. 377; for a purchase, by a tenant in common, of a tax title ordinarily inures to the benefit of all his

cotenants: *Lloyd v. Lynch*, 28 Pa. St. 419, 70 Am. Dec. 137; *Cecil v. Clark*, 44 W. Va. 659, 682; *Donnor v. Quartermas*, 90 Ala. 104, 24 Am. St. Rep. 778; *Clark v. Lindsey*, 47 Ohio St. 437; *Johnson v. Branch*, 9 S. Dak. 118, 62 Am. St. Rep. 857; *Tanney v. Tanney*, 159 Pa. St. 277, 39 Am. St. Rep. 678; *Baker v. Whiting*, 3 Sum. 475; *Busch v. Huston*, 75 Ill. 848; *Rothwell v. Dewees*, 2 Black, 613; *Harrison v. Harrison*, 56 Miss. 174; *Burhans v. Van Zandt*, 7 N. Y. 523; *Muthersbaugh v. Burke*, 33 Kan. 260; *Bender v. Stewart*, 75 Ind. 88, 91; *Burgett v. Tallafarro*, 118 Ill. 503; *Flinn v. McKinley*, 44 Iowa, 68; *Richards v. Richards*, 75 Mich. 408.

In some of the cases we find it stated that a cotenant "in possession" cannot purchase the common property at a sale for delinquent taxes, or otherwise acquire title as against his cotenant by purchasing a tax title thereto: *Thompson v. McCorkle*, 136 Ind. 484, 43 Am. St. Rep. 334; *Donnor v. Quartermas*, 90 Ala. 104, 24 Am. St. Rep. 778; but as the duty of a cotenant to pay his taxes is not imposed by possession, but springs from ownership, it follows that a tenant in common, whether in possession or not, cannot acquire a tax title against his cotenants: *Butler v. Porter*, 13 Mich. 292, 302; *Dubois v. Campau*, 24 Mich. 360; *Cohea v. Hemingway*, 71 Miss. 22, 42 Am. St. Rep. 449. As the purchase of a tax title, by a tenant in common, to the common property operates merely as an extinguishment of such title for the benefit of all the co-owners, the only right given by such a purchase is to make the cost thereof a charge on the common property, the purchaser having a right to reimbursement for his outlay: *Cohea v. Hemingway*, 71 Miss. 22, 42 Am. St. Rep. 449; *Muthersbaugh v. Burke*, 33 Kan. 260; *Harrison v. Harrison*, 56 Miss. 174; *Bracken v. Cooper*, 80 Ill. 221; *Clark v. Lindsey*, 47 Ohio St. 437; *Rothwell v. Dewees*, 2 Black, 613; *Delashmutt v. Parrent*, 39 Kan. 548; *Phipps v. Phipps*, 39 Kan. 495; *Chace v. Durfee*, 16 R. I. 248; *Allen v. Poole*, 54 Miss. 323; *Donnor v. Quartermas*, 90 Ala. 104, 24 Am. St. Rep. 778; *Burgett v. Tallafarro*, 118 Ill. 503; *Barker v. Jones*, 62 N. H. 497, 13 Am. St. Rep. 586; *Busch v. Huston*, 75 Ill. 848.

The grantee of a tenant in common is charged with the same duties and obligations toward the latter's cotenants as his grantor. He cannot, therefore, divest their interests by acquiring a tax deed to the common property: *Austin v. Barrett*, 44 Iowa, 488; *Jonas v. Flanniken*, 60 Miss. 577, 588; and it is also a rule that the spouse of a tenant in common cannot acquire a tax title to the property of the cotenancy where the other is disqualified: *Robinson v. Lewis*, 68 Miss. 60, 24 Am. St. Rep. 254; *Clark v. Rainey*, 72 Miss. 151; *Rothwell v. Dewees*, 2 Black, 613; *McChesney v. White*, 140 Ill. 330; *Busch v. Huston*, 75 Ill. 843; *Burns v. Byrne*, 45 Iowa, 285; *Lee v. Fox*, 6 Dana, 172; *Chace v. Durfee*, 16 R. I. 248; but see *Broquet v. Warner*, 43 Kan. 48, 19 Am. St. Rep. 124. A purchase by the wife of a tenant in common of the common property, at a tax sale, operates as a redemption: *Clark v. Rainey*, 72 Miss. 151.

A tax deed acquired by a tenant in common will not divest the interest of his cotenant, although the holder of the deed acquired the tax certificate before he became a tenant in common: *Tice v. Derby*, 59 Iowa, 312; *Flinn v. McKinley*, 44 Iowa, 68. A cotenant acquires no right to the common property by procuring another person to bid in the property for him at a tax sale and to take the deed: *Dubois v. Campau*, 24 Mich. 360; *Tanney v. Tanney*, 159 Pa. St. 277, 39 Am. St. Rep. 678; and a tenant in common cannot acquire an independent title against his cotenants where the land held in joint tenancy is sold at a treasurer's sale for the nonpayment of taxes, by taking an assignment of the purchaser's deed before the time for redemption has expired: *Lloyd v. Lynch*, 28 Pa. St. 419, 70 Am. Dec. 137. A tenant in common cannot set up a tax title to defeat the right of his cotenants to a partition: *Bracken v. Cooper*, 80 Ill. 221. A purchase of the common property by one cotenant at a tax sale does not create a resulting trust, so as to prevent the other cotenants from maintaining ejectment, after the expiration of a time prescribed by statute within which such trust may be enforced by action; and cotenants, who accept the proceeds of a tax sale of the common property without knowledge that the estate has been purchased at such sale by their cotenant, and without anything to excite suspicion or stimulate inquiry, are not estopped from availing of the deed to the purchaser: *Tanney v. Tanney*, 159 Pa. St. 277, 39 Am. St. Rep. 678. If a tenant in common in remainder purchases the land of the cotenancy at a tax sale before the termination of the life estate, he must be deemed a trustee of the legal title for the benefit of his cotenants, but is entitled to reimbursement: *Johns v. Johns*, 93 Ala. 239. So, if a tenant in common, after obtaining a tax title to the common property by false representations, procures from his cotenants the contract with their vendors, surrenders it to the vendors, and obtains a deed from them to himself, he is a trustee ex maleficio of his cotenants' part: *Maul v. Rider*, 51 Pa. St. 377. If the husband of a coheir, in possession of land, buys an outstanding tax title on the land of the heirs, he must be deemed to have purchased for the benefit of all the tenants in common, upon the condition that they reimburse him for the amount actually paid out by him: *Busch v. Huston*, 75 Ill. 343. So, if one of several tenants in common of the remainder in fee of lands, of which a person is seized as tenant in dower, purchases the lands at a tax sale, his purchase inures to the benefit of all the cotenants in remainder, but the buyer is entitled to contribution from them toward the cost of the purchase of the tax title: *Clark v. Lindsey*, 47 Ohio St. 437.

A purchase by a cotenant of the lands of a cotenancy at a tax sale may, however, vest title as against strangers. If the other cotenants do not complain, a stranger cannot: *Burgett v. Williford*, 56 Ark. 187, 35 Am. St. Rep. 96; and the rule that a cotenant cannot acquire a tax title as against his fellow-tenants does not apply if

the facts fail to establish a cotenancy by the tax purchaser in land sold for delinquent taxes: *Sheean v. Shaw*, 47 Iowa, 411; *Miller v. Donahue*, 96 Wis. 498. It has also been decided that, after a tax title to the lands of a cotenancy has matured in the hands of a stranger, one tenant in common may acquire from the purchaser at a tax sale the title which he thereby obtains, and may hold the same against his former cotenants: *Lewis v. Robinson*, 10 Watts, 354; *Kirkpatrick v. Mathiot*, 4 Watts & S. 251; *Reinboth v. Zerbe et al.* Imp. Co., 29 Pa. St. 139. See, also, *Keele v. Cunningham*, 2 Helsk. 288. This view is based on the ground that, when the title under the tax deed becomes absolute in the purchaser by the omission of the cotenants to redeem within the prescribed time, all the former relations of the cotenants with respect to the land are determined, and they stand in the position of strangers to one another; but it appears to be at variance with the well-settled principle that a person under "any legal or moral obligation to pay the taxes cannot, by neglecting to pay the same and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale himself, or by subsequently buying from a stranger who purchased at the sale. Otherwise, he would be allowed to gain an advantage from his own fraud or negligence in failing to pay the taxes. This the law does not permit, either directly or indirectly": *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94; *Coppinger v. Rice*, 33 Cal. 408, 425. And in *Dubois v. Campau*, 24 Mich. 360, where a tenant in common, in possession of and using the whole common property, failed to pay the taxes, as it was his duty to do, and a stranger purchased the same at a tax sale, *Christiancy, C. J.*, said: "In a case where a party whose duty it is to pay all the taxes on the land allows it to be sold for such taxes to a stranger who might hold the whole against all parties, though this may terminate the tenancy while such tax title is held by another, yet it has been terminated by the wrong of the party in default; and when he purchases in the title, he and the former owners are remitted to their original position and rights as they stood before the sale, and as they would have stood had the taxes been paid when due, or had the sale for the taxes been made directly to such party in default. Such, we think, must be the result upon principle." In *Alexander v. Sully*, 50 Iowa, 192, where the superior title was vested in a stranger, and had been for two years, it was held that one of the former co-owners could purchase such title for his own exclusive benefit, and that he might, as against his cotenant out of possession, acquire a tax title. If the lands of a cotenancy are lost by the eviction of the tenants under an adverse title, the cotenancy ceases, and if one of the cotenants then buys the lost land, the purchase is for his own exclusive benefit: *Coleman v. Coleman*, 3 Dana, 308, 28 Am. Dec. 86; and if a purchaser at a foreclosure sale acquires only an undivided part of the premises, thus becoming a cotenant with the mortgagor, he may obtain title to the remainder, by purchasing an outstanding

tax deed of the whole, where he claims title to the whole, under the foreclosure sale, adversely to the mortgagor: *Wright v. Sperry*, 21 Wis. 331. Adverse possession for twenty years by a tenant in common, under a tax deed, will give him title to the common property: *English v. Powell*, 119 Ind. 93. Compare *Davis v. Chapman*, 24 Fed. Rep. 674. A conveyance by one cotenant to another, for the purpose of partition, with a special covenant of warranty, will estop the grantor from asserting a title acquired subsequent to the conveyance and based on a tax sale made prior thereto: *Williams v. Gray*, 3 Greenl. 207, 14 Am. Dec. 234. If two persons own different parts of the same lot of land, and one pays the taxes on his part, but the other fails to pay his taxes, allows his part to be sold, buys it in at the sale, and takes the collector's deed therefor, he thereby acquires only the title to the part previously owned by him; and if his interest had been previously severed, in fact, the title acquired by the tax deed does not again make him a tenant in common: *Willard v. Strong*, 14 Vt. 532, 39 Am. Dec. 240. Supplementing a tax title with another title purchased from cotenants does not impair it, and the holder of it loses nothing by reason of having another: *Jonas v. Flanniken*, 69 Miss. 577.

Guardians.—A tax sale of a minor's land to his guardian conveys no title adverse to the ward, whether the tax deed is made to the guardian or to his assignee of the certificate: *Dohms v. Mann*, 76 Iowa, 723.

Heirs.—One who purchases land at a tax sale, in which land he has an interest as heir, acquires no additional title thereto: *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460. Lands, at the death of the ancestor, descend to the heir, subject to the ancestor's debts, and it is the heir's duty to pay the taxes. Hence, if he fails to do so, and allows the lands to be sold, himself becoming the purchaser, and has them conveyed to his guardian or to another in trust, the estate, as to creditors of the deceased, is not changed: *Platt v. St. Clair*, 6 Ohio, 227. So, where a father died seised of land, one of his heirs cannot, as against another heir, set up an adverse claim to the land under a tax title existing before, but purchased after, the father's death: *Richards v. Richards*, 75 Mich. 408. With reference to a tax title obtained upon the lands of a decedent during his lifetime, and which, since his death, has been transferred to his heir, such heir, who has no title except that derived from the decedent, stands in the same position with reference to such tax title as the decedent himself would, if living, and the tax title had been conveyed to him: *Dubois v. Campau*, 24 Mich. 360, 367.

Husband and Wife.—A wife is under no obligation, moral or legal, to pay the taxes on her husband's property. Hence, she may purchase, at a public tax sale, the lands of her husband, or of others of which he is in possession, if the purchase is made on her own account and with her own money. She may, at such sale, purchase land occupied by her husband, and acquire, at least, a valid lien for the amount of the purchase price, notwithstanding there

was an agreement between her husband and his landlord that the former should pay the taxes, and the wife had knowledge of such agreement: *Willard v. Ames*, 180 Ind. 351. Compare *Swift v. Agnes*, 33 Wis. 228. A tax title to land may be acquired by a married woman, acting in good faith, by a purchase out of her separate estate, although her husband is in possession of such land, and under a legal obligation to pay the taxes, and her possession, under her tax title, through tenants, is none the less adverse to the original owner by reason of the fact that her husband acts as her agent in the management of the property: *Wood v. Armour*, 88 Wis. 488, 43 Am. St. Rep. 918. See *Jonas v. Flanniken*, 69 Miss. 577.

The husband of a mortgagee may, by purchase at a tax sale, acquire the title of the mortgagor; but is precluded from becoming a purchaser for his own benefit as against his wife: *Laton v. Balcom*, 64 N. H. 92, 10 Am. St. Rep. 381. If husband and wife are out of possession, he may, after the death of a testator, acquire a valid tax title to the land of the heirs of which his wife is one, and title so acquired is superior to the rights of a mortgagee of the testator: *Broquet v. Warner*, 43 Kan. 48, 19 Am. St. Rep. 124.

Landlord and Tenant.—A tenant who is under an obligation to his landlord to pay the taxes on the land he rents is disqualified from purchasing the land at a tax sale, for taxes becoming delinquent through the neglect of the tenant to pay them. The most common instance in which a tenant is precluded from becoming a purchaser at a tax sale is where he has, by his lease, obligated himself to pay the taxes: *Williamson v. Russell*, 18 W. Va. 612, 623; *Carithers v. Weaver*, 7 Kan. 110; *Blake v. Howe*, 1 Aik. 681, 15 Am. Dec. 681; *Busch v. Huston*, 75 Ill. 343, 345; *Burgett v. Talliaferro*, 118 Ill. 503; *Bertram v. Cook*, 32 Mich. 518; Connecticut etc. Ins. Co. v. *Bulte*, 45 Mich. 113, 120; *Haskell v. Putnam*, 42 Me. 244; *Donnor v. Quartermas*, 90 Ala. 164, 24 Am. St. Rep. 778; *Shepardson v. Elmore*, 19 Wis. 424; *Walker v. Harrison*, 75 Miss. 665. In cases where a lessee has agreed to pay the taxes, the cases cited show that he cannot acquire a tax title which shall cut off the title of his landlord; and a tax deed to him under such circumstances has been held void: *Carithers v. Weaver*, 7 Kan. 110; and see *Blake v. Howe*, 1 Aik. 306, 15 Am. Dec. 681; but in other cases he is regarded as seised, under the tax deed, in trust for his landlord, if living, and if dead, for his heirs: *Burgett v. Talliaferro*, 118 Ill. 503; *Bertram v. Cook*, 32 Mich. 518. Neither can the tenant, at a tax sale, acquire a title to the leased premises in the name of another person for his benefit: *Blake v. Howe*, 1 Aik. 306, 15 Am. Dec. 681.

There are cases where the tenant would be disqualified from buying the land at a tax sale, though he had not agreed to pay the taxes: *Gaskin v. Blake*, 27 Miss. 675; *Waggener v. McLaughlin*, 33 Ark. 195. Although it is the duty of the landlord to pay the taxes, in the absence of any agreement to the contrary between the parties, yet the tenant will not ordinarily be permitted to take ad-

vantage of the omission of his landlord to pay the taxes, to terminate the relation between them, and obtain title to the land. His purchase thereof at a tax sale will be regarded as a payment only, and will confer no title as against his landlord, or one claiming under the landlord. Neither can he acquire any title by purchasing a certificate issued to another person as purchaser, and subsequently obtaining a deed as assignee: *Bailey v. Campbell*, 82 Ala. 342; *Jackson v. King*, 82 Ala. 432. See, also, *Williams v. Towl*, 65 Mich. 204; *Walker v. Harrison*, 75 Miss. 665. A tenant's purchase at a tax sale vests in him no title as against the heirs of his landlord: *Jackson v. King*, 82 Ala. 432. A tenant is bound to know that his possession is that of his landlord, and that such possession for more than the period prescribed by the statute of limitations, after a tax title accrues, bars all right of its holder to the possession of the premises. Hence, after it is so barred, the tenant cannot, by taking a warranty deed from the holder of such tax title, claim anything against his landlord on the ground of being an innocent purchaser: *Thode v. Spofford*, 65 Iowa, 294.

A tenant under no obligation to pay taxes on the demised premises may acquire a valid title thereto on a tax sale during the term, and thereby defeat his landlord's claim for subsequently accruing rent: *Weichselbaum v. Curlett*, 20 Kan. 709, 27 Am. Rep. 204. No legal obligation arises out of the relation of landlord and tenant which compels a tenant to pay taxes imposed upon the land of the landlord, and the tenant is not, therefore, estopped, on that ground, from setting up title in opposition to the landlord: *Bettison v. Budd*, 17 Ark. 546, 65 Am. Dec. 442. A tenant, though in possession, may, if he is under no obligation to pay taxes on the leased premises, purchase his landlord's land at a tax sale thereof, and the sale, if valid, will extinguish the landlord's title and cut off the lease: *Ferguson v. Etter*, 21 Ark. 160, 76 Am. Dec. 361. If premises have been sold to the state for taxes, the fact that a person subsequently takes possession of them under a contract of rental does not preclude him from buying the paramount title of the state: *Walker v. Harrison*, 75 Miss. 665; *Waggener v. McLaughlin*, 33 Ark. 195. The rule that a purchaser pendente lite holds property in trust for a party who succeeds in a suit does not apply, it is said, to a tenant who has acquired an independent title at a tax sale, as the tax is not a charge upon the tenant, but a lien upon the land, and if not paid by the person in whose name it is assessed, will follow the land into the hands of a subsequent purchaser: *Bettison v. Budd*, 17 Ark. 546, 65 Am. Dec. 442.

Licenses.—If the right to recover possession under a tax deed is barred in five years after the execution thereof, a licensee of real estate cannot acquire a tax title thereto, as against his licensor, whose right of possession has continued for more than that period after the execution of the tax deed: *Keokuk etc. Ry. Co. v. Lindley*, 48 Iowa, 11. A licensee, between whom and the owner of land there exists a relation of trust and confidence, cannot deprive the

owner of his land by purchasing it at a tax sale: *Saunders v. Farmer*, 62 N. H. 572.

Lienholders.—One who holds a judgment lien upon real property has the right to pay the taxes upon it when it is offered for sale for delinquent taxes, but this right does not impose upon him the duty to pay them. He may, therefore, acquire title to such property by purchasing it at a tax sale: *Morrison v. Bank of Commerce*, 81 Ind. 335. It has been held that the holder of a judgment lien junior to a mortgage can, by purchasing at a tax sale, acquire, as against the mortgagee, a title divesting the lien of the mortgage: *Wilson v. Jamison*, 36 Minn. 59, 1 Am. St. Rep. 635; but in *Fair v. Brown*, 40 Iowa, 209, it is held that a lienholder cannot, by purchase at a tax sale, acquire a title which will defeat the lien of another encumbrancer, such as that held by a mortgagee. "Equity will not permit him," said the court, "to acquire the title for an inconsiderable sum when he was authorized to remove the trifling encumbrance by redemption. Though not bound to pay the tax, yet it was his right to do so to protect his own liens. He cannot obtain that protection by pursuing a course that will deprive the mortgagee of his security and leave the mortgagor to sustain the weight of the liens, which are personal judgments, after being deprived of his property by tax title. Equity will relieve against such oppression, and teach the grasping creditor moderation in his demands, and that he cannot destroy others to build up his own fortunes": *Fair v. Brown*, 40 Iowa, 209, 211. Compare *Morgan v. Hammett*, 34 Wis. 512, 524.

Mortgagees.—A mortgagee in possession, or one who holds under him, cannot acquire title to the mortgaged premises by purchasing them at a tax sale: *Stinson v. Connecticut etc. Ins. Co.*, 174 Ill. 125, 66 Am. St. Rep. 262; *Moore v. Titman*, 44 Ill. 367; *Howze v. Dew*, 90 Ala. 178, 24 Am. St. Rep. 783; *Eck v. Swennumson*, 73 Iowa, 423, 5 Am. St. Rep. 690; *Burchard v. Roberts*, 70 Wis. 111, 5 Am. St. Rep. 148; *Mills v. Tukey*, 22 Cal. 373, 83 Am. Dec. 74; *Schenck v. Kelley*, 88 Ind. 444; *Brown v. Simons*, 44 N. H. 475; *Martin v. Swofford*, 59 Miss. 323. If he does make such purchase, either in his own name or that of another, the mortgagor has the right to treat it as a payment: *Stinson v. Connecticut etc. Ins. Co.*, 174 Ill. 125, 66 Am. St. Rep. 262; *Maxfield v. Willey*, 46 Mich. 252; *Eck v. Swennumson*, 73 Iowa, 423, 5 Am. St. Rep. 690; *Burchard v. Roberts*, 70 Wis. 111, 5 Am. St. Rep. 148; *McLaughlin v. Green*, 48 Miss. 175, 209; and to compel the canceling of the certificate of sale on refunding the money paid with interest: *Stinson v. Connecticut etc. Ins. Co.*, 174 Ill. 125, 66 Am. St. Rep. 262. A tax title acquired by a mortgagee in possession will not prevail against the mortgagor or his devisee: *Howze v. Dew*, 90 Ala. 178, 24 Am. St. Rep. 783; nor can a mortgagee, by acquiring a tax title, cut off the mortgagor's equity of redemption: *Burchard v. Roberts*, 70 Wis. 111, 5 Am. St. Rep. 148; *Williams v. Townsend*, 81 N. Y. 411. A mortgagee will not be allowed to use a tax title to defeat a mechanic's

lien: *McLaughlin v. Green*, 48 Miss. 175; and a creditor secured by a deed of trust on land cannot buy a tax title for the mutual benefit of himself and the grantor, and then use the title acquired to defeat the equity of redemption: *Martin v. Swofford*, 59 Miss. 328, 332.

Some cases attach importance to the circumstance of possession by the mortgagee, and hold that a mortgagee out of possession, and who is under no obligation to pay the taxes, may lawfully acquire title through a tax sale, and thus cut off the mortgagor's equity of redemption: *Beckwith v. Seborn*, 31 W. Va. 1; *Summers v. Kanawha*, 26 W. Va. 159; *Cornell v. Woodruff*, 77 N. Y. 203; *Allen v. Dayton Hotel Co.*, 95 Tenn. 480; *Waterson v. Devoe*, 18 Kan. 223; *Spratt v. Price*, 18 Fla. 289; and compare *Sturdevant v. Mather*, 20 Wis. 576, 585. The mere relation, it is said, of mortgagee does not prevent him from acquiring title to the mortgaged premises by purchase at a tax sale: *Waterson v. Devoe*, 18 Kan. 223; and "there is no such relation of trust," it is said, "between a mortgagor and mortgagee as prevents the latter from acquiring an adverse claim or lien to or upon the mortgaged premises, and enforcing the same with like effect as any stranger could. The mortgage is a mere security for a debt, and imposes no duty upon the mortgagee to protect the interests of the mortgagor, unless there is some special covenant creating such a duty": *Cornell v. Woodruff*, 77 N. Y. 203, 206. If the circumstances of a case show that it would be a fraud on the rights of the mortgagor to permit the mortgagee to purchase the mortgaged premises at a tax sale for taxes which he had suffered to become delinquent, neither the mortgagee nor his executor, where the mortgagee is dead, can acquire a tax title to the property; but where the circumstances show that a mortgagee is not in possession of the lands conveyed by a mortgage deed, that there is no trust relation existing between the mortgagor and the mortgagee, and that the latter is not bound by any covenant, agreement, or promise to pay the taxes on the property, the mortgagee, it has been held, may purchase the mortgaged lands at a tax sale thereof, and acquire a good title thereto under his tax deed. If the mortgagee is dead, it follows that his executor may, under such circumstances, purchase the land at a tax sale, and acquire a valid tax title thereto: *Beckwith v. Seborn*, 31 W. Va. 1. It would seem, however, from what is said in *Stinson v. Connecticut etc. Ins. Co.*, 174 Ill. 125, 129, 66 Am. St. Rep. 262, 264, *Ragor v. Lomax*, 22 Ill. App. 628, 633, and *Martin v. Swofford*, 59 Miss. 328, 331, that there is a tendency in the later cases to hold that a mortgagee, whether in or out of possession, will not be permitted to acquire and hold a tax title against the mortgagor: See, also, *Hall v. Wescott*, 15 R. I. 373, 380; *Home Sav. Bank v. Boston*, 131 Mass. 277, 278.

One who holds a mortgage on property cannot ordinarily defeat a prior mortgage by acquiring a tax title thereto: *Woodbury v. Swan*, 59 N. H. 22; *Frank v. Arnold*, 73 Iowa, 370; *Smith v. Lewis*, 20 Wis. 350; *Garrettson v. Scofield*, 44 Iowa, 35; *Goodrich v. Kim-*

berly, 48 Conn. 395. A second mortgagee does not owe any duty to the first mortgagee to pay the taxes; and if the title of both is extinguished by a tax sale, their prior relations cease, and the junior mortgagee may then purchase and assert the tax title, unless he is in possession under the foreclosure of his mortgage or has, in some manner, obligated himself to pay the taxes. So, if premises subject to a first and a second mortgage are permitted to become delinquent for taxes and to be sold and conveyed to a third person without any collusion with the junior mortgagee, the latter may afterward purchase the tax title and assert it against the senior mortgagee. Nor is it material that the junior mortgagee was a county treasurer, and as such, in his official capacity, made the tax sale in question: *Safe Deposit & Trust Co. v. Wickhem*, 9 S. Dak. 341, 62 Am. St. Rep. 873. A junior mortgagee who has foreclosed and bought the property may obtain a tax title to it, and, where such title has become absolute, it is a good defense in ejectment brought by the senior mortgagee, until the latter shall do "what is equitable in respect to it": *Connecticut etc. Ins. Co. v. Bulte*, 45 Mich. 113, 123. A purchaser under proceedings to foreclose a senior mortgage, to which a junior mortgagee was not made a party, cannot, by purchasing the mortgaged premises for taxes, thereby acquire rights which would bar the junior mortgagee from redeeming upon the payment of the proper amount due: *Anson v. Anson*, 20 Iowa, 55, 89 Am. Dec. 514. A purchase of land at a tax sale by a party for the benefit of the mortgagee operates as a payment of the tax and a redemption of the land therefrom, both as to the mortgagor of the land against whom the taxes were assessed while in possession, but who was not the real owner, also as to the actual owners in fee; and a deed based on such sale is, therefore, invalid, and no title paramount to that of the true owner can be thereby acquired: *Burchard v. Roberts*, 70 Wis. 111, 5 Am. St. Rep. 148. Under the statute of Minnesota, a mortgagee may, as against the mortgagor, acquire a tax title to the property mortgaged, where he is neither legally nor equitably bound to protect the property against the delinquent taxes for which it is sold: *Reimer v. Newell*, 47 Minn. 237. See subdivision "Agents," supra.

Mortgagors.—A mortgagor cannot defeat the lien of a mortgagee by acquiring a tax title upon the land: *Jordan v. Sayre*, 29 Fla. 100; *Fair v. Brown*, 40 Iowa, 209; *Frye v. Bank of Illinois*, 11 Ill. 367; *Voris v. Thomas*, 12 Ill. 442; *Ralston v. Hughes*, 13 Ill. 469; *Dunn v. Snell*, 74 Me. 22; *Maxfield v. Willey*, 46 Mich. 252; *Allison v. Armstrong*, 28 Minn. 276, 41 Am. Rep. 281; *Barnard v. Wilson*, 74 Cal. 512; *Stears v. Hollenbeck*, 38 Iowa, 550; *Dayton v. Rice*, 47 Iowa, 429; *Gardiner v. Gerrish*, 23 Me. 46; *Phinney v. Day*, 76 Me. 83; *Kezer v. Clifford*, 59 N. H. 208; *Travellers' Ins. Co. v. Patten*, 98 Ind. 209; *Cooper v. Jackson*, 99 Ind. 566; *Newton v. Marshall*, 62 Wis. 8; *Porter v. Lafferty*, 33 Iowa, 254. Nor can one claiming under the mortgagor so defeat such lien: *Fair v. Brown*, 40 Iowa, 209; *Jordan v. Sayre*, 29 Fla. 100; *Stears v. Hollenbeck*, 38 Iowa,

550; Avery v. Judd, 21 Wis. 262; Fallass v. Pierce, 30 Wis. 443; Austin v. Citizens' Bank, 30 La. Ann. 689; Leppo v. Gilbert, 26 Kan. 138; Cooper v. Jackson, 99 Ind. 566; Fells v. Barbour, 58 Mich. 49, 54; Porter v. Lafferty, 33 Iowa, 254.

A mortgagor cannot, of course, acquire a tax title to mortgaged land, on which he has agreed to pay the taxes, so as to defeat the rights of the mortgagee or his assignee: Dunn v. Snell, 74 Me. 22; Allison v. Armstrong, 28 Minn. 276, 41 Am. Rep. 281. He cannot, through a breach of his own covenant to pay the taxes, acquire a tax title to the mortgaged premises; and in this respect his grantee stands in no better position than the mortgagor himself: Washington etc. Trust Co. v. McKenzie, 64 Minn. 273. A mortgage being conditioned for the payment of taxes by the mortgagor, he cannot acquire a valid tax title to the premises as against the mortgagee, during the life of the mortgage, although the mortgagor has sold the premises and there is no personal covenant that he shall pay taxes: Allison v. Armstrong, 28 Minn. 276, 41 Am. Rep. 281.

It is the duty of a mortgagor of land, who owns it when assessed, and the taxes thereon are due, to pay them: Barnard v. Wilson, 74 Cal. 512; Dayton v. Rice, 47 Iowa, 429; Phinney v. Day, 76 Me. 83; Fells v. Barbour, 58 Mich. 49, 54. It is also the duty of one who has acquired the mortgagor's interest in the property to discharge the unpaid taxes against it; and neither the mortgagor nor his grantee can, by neglecting this duty and allowing the land to be sold for taxes, acquire any rights as against the mortgagee, by buying at the tax sale himself, or by subsequently buying from a stranger who purchased at the sale: Barnard v. Wilson, 74 Cal. 512; Fells v. Barbour, 58 Mich. 49, 54; Cooper v. Jackson, 99 Ind. 566; Phinney v. Day, 76 Me. 83; Fair v. Brown, 40 Iowa, 209; Washington etc. Trust Co. v. McKenzie, 64 Minn. 273.

Neither party to a mortgage can be suffered, against the will of the other, to buy at a tax sale and thereby cut off the other's interest; but either may bid, as a stranger to the title may, if the other makes no objection: Maxfield v. Willey, 46 Mich. 252, 255. A tenant of the mortgagor cannot acquire a tax title as against the mortgagee: Dunn v. Snell, 74 Me. 22. It is the duty of the owner of an equity of redemption, until the mortgagee takes possession for condition broken, to pay the taxes on the property, and he cannot, therefore, acquire a title to it by purchasing it at a tax sale: Ralston v. Hughes, 13 Ill. 470, 476. A mortgagor cannot defeat the title of a mortgagee, or of a third person buying the property under foreclosure proceedings, by purchasing the premises at a tax sale; neither can one who purchased from the mortgagor, subject to the mortgage, and who agreed to discharge it: Porter v. Lafferty, 33 Iowa, 254. The rule that a mortgagor cannot defeat the lien of a mortgagee by acquiring a tax title to the land applies to the owner of a small undivided interest in an equity of redemption: Middleton Sav. Bank v. Bacharach, 46 Conn. 513.

A mortgagor's grantee, in possession of mortgaged land subject to the mortgage, cannot, as against the mortgagee, acquire a title under a sale for taxes which the mortgagor, or those holding under him, were bound to pay: *Avery v. Judd*, 21 Wis. 262; *Stears v. Hollenbeck*, 38 Iowa, 550; *Fallass v. Pierce*, 30 Wis. 443; *Leppo v. Gilbert*, 26 Kan. 138; *Magner v. Hibernia Ins. Co.*, 30 La. Ann. 1357. But a stranger to the mortgagee and his assignee may purchase a portion of the mortgaged premises of one of the several mortgagors, acquire a valid tax title thereto, and hold the same for his own benefit: *Gardiner v. Gerrish*, 23 Me. 46. If land is sold at an administrator's sale, subject to a mortgage, the purchaser stands in the same position as the mortgagor, and cannot acquire a tax title so as to cut off the mortgage; and this is true though the tax deed was issued to the purchaser's husband, where he was acting as his wife's agent in the purchase of the land, for the court will assume that he took the deed as her agent, and will hold it invalid as against the mortgagee: *Edgerton v. Schneider*, 26 Wis. 385, 390. If a mortgagor, by fraud and collusion with a third party, permits the land to be sold for taxes, and procures such person to buy it, for the purpose of defeating the mortgage, the tax title will be treated as if the mortgagor were the purchaser: *McAlpine v. Zitzer*, 119 Ill. 273; *Austin v. Citizens' Bank*, 30 La. Ann. 639.

A tax deed taken by the wife of the mortgagor, at his request and for his benefit, is not valid as against the mortgagee: *Drew v. Morrill*, 62 N. H. 565; but it has been held that the wife of a grantor in a trust deed may acquire a tax title to the encumbered land and successfully defend an action of ejectment brought by the secured creditor who purchased at the trustee's sale: *Carter v. Bustamente*, 59 Miss. 559. A purchaser who takes a quitclaim deed from the mortgagor, before the period of redemption expires, cannot perfect a tax title against the mortgagee: *Washington etc. Trust Co. v. McKenzie*, 64 Minn. 273.

Officers.—A purchase, either directly or indirectly, by an officer who sells property for delinquent taxes, and at his own sale, is invalid: *Sponable v. Woodhouse*, 48 Kan. 173; *Ellis v. Peck*, 45 Iowa, 112; *Taylor v. Stringer*, 1 Gratt. 158; *Chandler v. Moulton*, 33 Vt. 245; and the same is true of such a sale by the officer's deputy: *Ellis v. Peck*, 45 Iowa, 112; *Taylor v. Stringer*, 1 Gratt. 158; but such a purchase is voidable only at the option of the owner of the property, or his heirs, and not absolutely void: *Pierce v. Benjamin*, 14 Pick. 356, 25 Am. Dec. 396; *Taylor v. Stringer*, 1 Gratt. 162; *Ellis v. Peck*, 45 Iowa, 112. The fraud of the officer, it is said, will not defeat the title based thereon, when held by a subsequent purchaser for value without notice, except upon proper proceedings instituted therefor: *Ellis v. Peck*, 45 Iowa, 112. But in Vermont a tax officer cannot personally, or by agent, purchase property at a tax sale conducted by himself, and acquire thereby any title to the property, although the owner has, by statute, a year after the sale within which to redeem and does not redeem: *Chandler v.*

Moulton, 33 Vt. 245. A clerk at an auction sale for taxes is, however, not an officer making or controlling the sale, and may become a purchaser thereat: Wells v. Jackson Iron Mfg. Co., 47 N. H. 235, 30 Am. Dec. 575; and it is not contrary to the policy of the law to allow the clerk of the county commissioners to be a purchaser at such a sale: Fox v. Cash, 11 Pa. St. 207.

Owners.—An owner of land, who ought to pay the taxes, but who lets it be sold for delinquent taxes and buys it in, either directly or through a stranger who purchased at the sale, does not get thereby any independent title. The purchase will be treated as but a payment of the taxes: McAlpine v. Zitzer, 119 Ill. 273; Griffin v. Turner, 75 Iowa, 250; Whitney v. Gunderson, 31 Wis. 359, 379; Jacks v. Dyer, 81 Ark. 334; Middleton Sav. Bank v. Bacharach, 46 Conn. 518; Montgomery v. Whitfield, 41 La. Ann. 649; Gates v. Lindley, 104 Cal. 451; McChesney v. White, 140 Ill. 330; Petty v. Mays, 19 Fla. 652; Smith v. Phelps, 63 Mo. 585; Oswald v. Wolf, 129 Ill. 200. It is a familiar rule that the owner of land, or one under obligation to pay the taxes thereon, cannot acquire a tax title so as to defeat encumbrancers or others setting up a claim or title adverse to him: Seymour v. Harrison, 85 Iowa, 130, 133; and the same principle applies when the agent of the owner of land suffers it to be sold for delinquent taxes and bids it in for his own use: McChesney v. White, 140 Ill. 330.

The rule that one whose duty it is to pay a tax cannot be a purchaser of the property offered for sale at a tax sale applies to one who has become the owner of property subject to a tax, though his interest is but a small undivided interest in an equity of redemption: Middleton Sav. Bank v. Bacharach, 46 Conn. 513. An owner of land cannot acquire title to another's land by having it assessed with his own, allowing the whole to be sold for the entire taxes, and buying the property himself at such sale: Ragsdale v. Alabama etc. R. R. Co., 67 Miss. 106. The owner of property cannot, by a tax deed, which is the result of a deliberate and outrageous fraud, cut off mortgages on the property: Perkins v. Wilkinson, 86 Wis. 538. If lands sold for taxes are redeemed by the delinquent, they again become subject to a lien for prior unpaid taxes: Thorington v. City Council, 88 Ala. 548. If the owner of land, who is bound to pay the taxes thereon, allows it to be sold for delinquent taxes, buys the title and has it conveyed to a third person for his benefit, he cannot set up such title as a defense in ejectment against one who has purchased at an execution sale against him since the tax deed was executed: Swift v. Agnes, 33 Wis. 228. If the owner of property takes a deed therefor from one who holds a tax title to it, the tax title becomes merged in the title of the general owner: Wygant v. Dahl, 28 Neb. 562.

A purchase at a tax sale by a part owner who is liable for the tax does not strengthen his title: Choteau v. Jones, 11 Ill. 300, 50 Am. Dec. 460; Willard v. Strong, 14 Vt. 532, 39 Am. Dec. 240; Lewis v. Ward, 99 Ill. 525. See, also, State v. Williston, 20 Wis. 228; and

compare *Towle v. Shelly*, 19 Neb. 632, for other views. If the owner of a distinct tract of land neglects to pay the taxes thereon, and it, with other land assessed with it in one parcel, is sold at a delinquent tax sale, and such owner becomes the purchaser of the whole, the sale has been held void, on the ground that the purchaser was in default in not paying his own tax: *Cooley v. Waterman*, 16 Mich. 366. Before he can purchase he must pay the taxes on the part owned by him; he may then acquire a title to the part of the tract, the same as a stranger: *Lewis v. Ward*, 99 Ill. 525. Furthermore, if one who owns part of a tract of land assumes to pay the taxes on the entire tract, upon being furnished with money for that purpose, he is disqualified from purchasing the tract at a sale for taxes, whoever may have furnished the money: *Lewis v. Ward*, 99 Ill. 525.

While the rule is well settled that persons who, by reason of their ownership of lands or otherwise, are under a legal, or perhaps a moral, obligation to pay taxes and assessments thereon, will be precluded by the policy of the law from becoming purchasers of such lands at a tax sale, the reason of the rule creating such disqualification manifestly does not exist when the landowner holds by a title acquired subsequently to the levy of the tax, has not assumed the payment of the tax, and has in no way become liable to see it paid: *Oswald v. Wolf*, 129 Ill. 200. The owner of "unseated" lands in Pennsylvania may purchase them at a tax sale the same as a stranger could: *Neill v. Lacy*, 110 Pa. St. 294, 295. The daughter of a delinquent taxpayer may purchase at a tax sale, though she is represented at the sale by her father, as her agent: *Thorington v. City Council*, 88 Ala. 548. In *Branham v. Bezanson*, 33 Minn. 49, it is held that the owner of real estate may purchase it at a tax sale, on the ground that a claim of title under such a sale is not inconsistent with a claim of title antecedent to it.

Partnership.—It is against the policy of the law to permit a partnership or combination to be formed for the purpose of purchasing at tax sales: *Dudley v. Little*, 2 Ohio, 504, 15 Am. Dec. 575.

Persons in Possession.—One merely in possession of a tract of land when it is assessed for taxes may purchase it at a sale for delinquent taxes where he was under no obligation to pay the taxes: *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94; *Link v. Doerfer*, 42 Wis. 391, 24 Am. Rep. 417; *Sands v. Davis*, 40 Mich. 15; *Blackwood v. Van Vleit*, 30 Mich. 118; *Stubblefield v. Borders*, 92 Ill. 279; *Bowman v. Cockrill*, 6 Kan. 311; *Seaver v. Cobb*, 98 Ill. 200; *Buckley v. Taggart*, 62 Ind. 236; but compare *Lacey v. Davis*, 4 Mich. 140, 66 Am. Dec. 524, holding that one in possession of property as a trespasser, or under color of title, acquires no additional title by suffering the property to be sold for taxes and becoming a purchaser at such sale; and which case is criticised in *Blackwood v. Van Vleit*, 30 Mich. 118. Thus, one who enters upon and occupies land as a mere intruder is under no obligation to pay the taxes and may acquire title to the land under a tax deed adverse to the former

owner or his grantees: *Link v. Doerfer*, 42 Wis. 391, 24 Am. Rep. 417; and possession under a deed which conveys no interest does not disqualify the grantee from purchasing the property when sold for taxes: *Curtis v. Smith*, 42 Iowa, 665. But where it appears that such person was in duty bound to pay the taxes, he can acquire no title by his purchase: *Blackwood v. Van Vleet*, 30 Mich. 118; *Bassett v. Welch*, 22 Wis. 175; *Jones v. Davis*, 24 Wis. 229; *Foley v. Kirk*, 33 N. J. Eq. 170; *O'Halloran v. Fitzgerald*, 71 Ill. 53; *Stubblefield v. Borders*, 92 Ill. 279; *Chambers v. Wilson*, 2 Watts, 495; *Kelsey v. Abbott*, 13 Cal. 609. It may be shown that a person was in a position, while his tax title was maturing, which made it his duty to pay the taxes, but it does not necessarily follow from the fact of his possession when the taxes were assessed that he was bound to pay them: *Blakeley v. Bestor*, 13 Ill. 709; *Stubblefield v. Borders*, 92 Ill. 279.

One in possession of land, under a claim of title, and who is morally or legally bound to pay the taxes, cannot acquire title to the property by purchasing it, either directly or indirectly, at a tax sale: *Whitney v. Gunderson*, 31 Wis. 359, 379; *Dubois v. Campau*, 24 Mich. 360; *Thomas v. Stickle*, 32 Iowa, 71; *McMinn v. Whelan*, 27 Cal. 300; *Coppinger v. Rice*, 33 Cal. 406; *Bernal v. Lynch*, 36 Cal. 135; *Barrett v. Amerlein*, 36 Cal. 322; *Relly v. Lancaster*, 39 Cal. 354; *Garwood v. Hastings*, 38 Cal. 216; *Christy v. Fisher*, 58 Cal. 256; *Lybrand v. Haney*, 31 Wis. 230; *Bassett v. Welch*, 22 Wis. 175; *Jones v. Davis*, 24 Wis. 229; *Burns v. Lewis*, 86 Ga. 591; *Jacks v. Dyer*, 31 Ark. 333; *Guynn v. McCauley*, 32 Ark. 97; *Rodman v. Sanders*, 44 Ark. 504; *Rule v. Broach*, 58 Miss. 552; *Wambole v. Foote*, 2 Dak. 1; *Miller v. Ziegler*, 31 Kan. 417. So, a purchase of land at a tax sale by the agent of one who was in possession thereof, either by himself or his tenants, does not pass the title to the land or otherwise affect it: *Bernal v. Lynch*, 36 Cal. 135. Possession of land, with a claim of ownership, is a subject of taxation, and imposes on the occupant the duty of paying the tax levied on the property: *Relly v. Lancaster*, 39 Cal. 354, 357.

A person in possession who claims title to land listed for taxation in his name cannot enlarge his interest therein by permitting it to be sold for taxes and purchasing it himself, either directly or indirectly: *Pleasants v. Scott*, 21 Ark. 370, 76 Am. Dec. 403; *Voris v. Thomas*, 12 Ill. 442; *Douglas v. Dangerfield*, 10 Ohio, 152; *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460. The purchaser of land at an administrator's sale is under no legal obligation to pay for it until the sale has been confirmed by the court, but if he goes into possession before that time and uses and occupies the land, he cannot acquire a tax title thereto, as against the heirs, by reason of his relation to the land: *Pool v. Ellis*, 64 Miss. 555, 563. If the plaintiffs, as assignees of the purchaser at a tax sale, acquire title to the land in question after the tax sale, but before the expiration of the time for redemption, they are precluded from acquiring a

tax title to the land so as to defeat the payment of prior taxes thereon to the same extent as though they were the owners at the time of the levy of the taxes: *Bowman v. Eckstein*, 46 Iowa, 583. A stranger's possession, held neither as tenant, trustee, nor agent of the owner, is no impediment to the acquisition of a tax title upon the land: *Curtis v. Smith*, 42 Iowa, 665, 671; *Bowman v. Cockrill*, 6 Kan. 311, 332; and a man who holds a defective title may purchase a better one at a tax sale: *Coxe v. Gibson*, 27 Pa. St. 160, 67 Am. Dec. 454.

One who is in possession of land, receiving its rents and profits, cannot acquire a title to it by a purchase at a tax sale: *Kelsey v. Abbott*, 13 Cal. 609; *Rodman v. Sanders*, 44 Ark. 504; *Hunt v. Gaines*, 33 Ark. 267; *Duffitt v. Tuhan*, 28 Kan. 292. This rule applies to the wife of the owner: *Sanders v. Ellis*, 42 Ark. 215; to his tenant: *Duffitt v. Tuhan*, 28 Kan. 292; and to a cotenant: *Davis v. Chapman*, 24 Fed. Rep. 674. A party in possession of premises under a sheriff's sale, and who receives the rents and profits during the time for redemption, cannot acquire title to them by allowing the property to be sold for taxes, and buying it in: *Kelsey v. Abbott*, 13 Cal. 609. If a person in possession of property, under color of title, receives the rents and profits, which are more than enough to pay the taxes, permits it to be sold for taxes and to be purchased by his agent, takes from him a transfer of the certificate of purchase after he is reimbursed by the collection of rents for the money paid upon his bid, and then procures the tax deed from the agent, for the purpose of strengthening his title, no title is acquired by the purchase: *Guynn v. McCauley*, 32 Ark. 97, 111.

Persons Out of Possession, claiming under a prior void tax sale, may purchase at a subsequent tax sale: *Mallory v. French*, 44 Iowa, 133; *Neal v. Frazier*, 63 Iowa, 451. A party who is out of possession of land, and whose only claim thereto is based upon a tax deed void on its face, may acquire a valid title by purchase at a subsequent tax sale, although the land was assessed to him: *Staley v. Leomans*, 53 Ark. 428, 22 Am. St. Rep. 231. The grantee of a tax deed, who is out of possession, and whether such deed is valid or void, may abandon all claim of title under it, and acquire title by a new deed under a subsequent sale: *Eaton v. North*, 29 Wis. 75, 78. If title is disputed, and the defendant, pending litigation respecting it, and being out of possession, attempts to acquire title derived through a tax sale from which the plaintiff offers to redeem, the tax title will be held ineffectual, and the plaintiff allowed to redeem: *Butterfield v. Walsh*, 36 Iowa, 534.

Persons Bound by Agreement to Pay Taxes on property cannot, by neglecting to do so, acquire title thereto by a purchase thereof when it is sold for delinquent taxes, especially when they are in possession, and it makes no difference whether they are lessees, cotenants, agents, trustees, mortgagors, mortgagees, tenants for life, lienholders, or other persons: *Carithers v. Weaver*, 7 Kan. 110; *Woodman v. Davis*, 32 Kan. 344; *Donnor v. Quartermas*, 90 Ala. 164, 24

DEERE v. BONNE.

[108 IOWA, 281.]

HUSBAND AND WIFE—LIABILITY OF HER SEPARATE ESTATE FOR HIS DEBT.—If a wife, in good faith, forms a business partnership with a third person, her husband does not, by voluntarily and gratuitously devoting his services to his wife's business, acquire any interest in the firm property which may be subjected to the payment of his individual debts, although his labor and skill have contributed largely to the firm's accumulation of property.

Suit in equity to subject a wife's property to the payment of her husband's debt. The husband and wife, E. S. West, and the firm were defendants. The relief prayed was denied, and the plaintiff appealed.

Thomas H. Smith, for the appellant.

G. W. Cullison, for the appellees.

²⁸¹ LADD, J. The stock in trade and building of J. C. Bonne were destroyed by fire August 20, 1892, and on the following day he assigned his other property not exempt from execution, together with claims under policies of insurance, to George H. Rink, for the benefit of all his creditors. Thereupon the good people of Shelby and vicinity raised, by voluntary contribution, about eight hundred dollars, and presented it to his wife, D. K. Bonne. With this she constructed another building, purchased goods, and engaged in business similar to that previously conducted by her husband. If the agent of the plaintiff arranged with him to ²⁸² ship goods in the name of an employé or herself to avoid creditors she was not aware of it, and in fact paid the bills. In February, 1893, she formed a partnership with E. S. West, which has continued since, and the firm of Bonne & West has assets valued at over three thousand dollars. During all this time J. C. Bonne managed her interest in the business, and gave it his entire time and attention, without any agreement whatever with reference to his compensation. True, his answers on this point, in the proceedings auxiliary to execution, were somewhat equivocal. But these, when considered in connection with the answers of his wife, leave no doubt of the conclusion stated. Nor do we think the evidence justifies the conclusion that conducting the business in her name was a mere scheme to hinder and delay or defraud his creditors. The fact that he was doing business for and in his wife's name does not, alone, warrant such an infer-

ence. After the final distribution of the moneys by the assignee derived from his estate, he was still indebted several thousand dollars, and it is evident that without means he was not in a situation to engage in business again. The money donated belonged to the wife, and we know of no reason why she might not re-establish the business of her husband destroyed by fire and prosecute it with her own means and credit: Code, sec. 3164; Spafford v. Warren, 47 Iowa, 47. That she did so with the aid of her husband, and both so intended, this record leaves not the slightest doubt. The labor and sagacity of the husband undoubtedly contributed largely to the accumulation of the property, but these he voluntarily gave, with no agreement for recompense. In Robb v. Brewer, 60 Iowa, 540, the court said: "The use by the husband of his personal earnings in payment for property purchased by his wife amounts, in legal contemplation, to a gift of such property to his wife. As the earnings were exempt from execution at the time they were employed in the acquisition of the property in controversy, a voluntary gift of such earnings was no fraud upon the husband's creditors. ²⁸⁸ The earnings being exempt from execution, her husband had a right to employ them as he pleased": Carse v. Reticker, 95 Iowa, 25, 58 Am. St. Rep. 421; Nash v. Stevens, 96 Iowa, 616. That neither the husband nor his creditors can lay any claim to the improvements of the wife's land or its products, though made or produced, in whole or in part, by his labor, is well settled: Carn v. Royer, 55 Iowa, 651; Webster v. Hildreth, 33 Vt. 457, 78 Am. Dec. 632; Burleigh v. Coffin, 22 N. H. 118, 53 Am. Dec. 236; Feller v. Alden, 23 Wis. 301, 99 Am. Dec. 173; Rush v. Vought, 55 Pa. St. 437, 93 Am. Dec. 769. In Feller v. Alden, 23 Wis. 301, 99 Am. Dec. 173, an apportionment is suggested, but held not to be involved, as the action was at law. In Glidden v. Taylor, 16 Ohio St. 509, 91 Am. Dec. 98, the husband took the wife's property and controlled it absolutely, merely telling her that he would "support the family, spend what money he desired, and invest the residue for her benefit"; and all save her investment, with interest, was subjected to the payment of his debts. In Hoag v. Martin, 80 Iowa, 718, the husband, in feeble health, and unable to do farm work, did all the business for the wife and thereby aided in the accumulation of the property and the court said: "In view of these facts, it was but natural and in the ordinary course of experience that he should attend to the business affairs of his wife; and the fact that his labor in this respect

aided in the accumulation of the property if voluntarily done, would not divest her of title, or give him a specific interest therein." In *Russell v. Long*, 52 Iowa, 250, the cows of the wife were cared for by the husband, and kept on a farm rented by him, and the court, speaking through Rothrock, J., said: "But it is contended that the increase of the property belongs to the husband, because he was the party by whose labor, skill, and care such increase was produced. If it had been shown that the husband hired the cows of the plaintiff for a given period, and that during such period the increase was produced, there might be force in the suggestion. But the record shows that the husband voluntarily expended his labor and the products thereof in ²⁸⁴ the care and keeping of his wife's property; and it does not appear that there was any agreement for compensation, either in the increase of the property or otherwise. We think the property was not liable for the payment of the husband's debts." Whatever the obligation of the husband to work for the benefit of his creditors, there is no rule in law or equity preventing him from voluntarily and gratuitously devoting his labor and skill to the business of his wife: *Webster v. Hildreth*, 33 Vt. 457, 78 Am. Dec. 632. There is no magic in the husband's touch by which he may acquire an interest in her separate property by his mere supervision of labor. If entitled to anything, it must be compensation owing to an express agreement, as there is no implied obligation on the part of the wife to pay her husband for services rendered: *Lewis v. Johns*, 24 Cal. 98, 85 Am. Dec. 49. *Penn v. Whitehead*, 17 Gratt. 503, 94 Am. Dec. 478, is not in point, as that was a contest between creditors in which the rights of the wife were not involved. We conclude that, as the wife engaged in the business of the firm of which she is a member in good faith, and the husband voluntarily gave his services, he acquired no interest in the firm property which may be subjected to the payment of his individual debts.

Affirmed.

HUSBAND AND WIFE—CREDITORS.—WHEN A HUSBAND GIVES HIS TIME AND SERVICES to his wife's business, making it successful, the earnings upon or increase in her capital in such business, though due in part to his services, belong to her, and are not liable to be seized by his creditors, especially when his services are rendered upon a compensation not shown to be unusual for such services: *Taylor v. Wanda*, 55 N. J. Eq. 491, 62 Am. St. Rep. 818.

PLYMOUTH COUNTY v. KERSEBOM.

[108 IOWA, 304.]

OFFICERS—SURETIES ON COUNTY TREASURER'S BOND—LIABILITY OF.—If a county treasurer collects money by virtue of his office, but absconds therewith after the expiration of his term and before his successor has qualified, the sureties on his bond are answerable therefor where the conditions of the bond signed by them required the payment of the money in question to some one authorized to receive it and this was not done.

Action to recover of a late treasurer and the sureties on his official bond the amount of an alleged defalcation. From a judgment for the plaintiff the defendants appealed.

P. Farrell, McDuffie & Keenan, and Sammis & Scott, for the appellants.

John Adams and Ira T. Martin, for the appellee.

308 ROBINSON, C. J. The defendant Kerseboom was elected and qualified as treasurer of the plaintiff for the term which commenced in January, 1894, and served as treasurer during the full term. At the general election held in the year 1895 he was re-elected, but failed to qualify for the second term. The law at that time in force required him to qualify by the first Monday of January, 1896, which was the sixth day of the month, and provided that a failure to so qualify should be deemed a refusal to serve: Code 1873, secs. 685, 686. Kerseboom continued to act as treasurer, however, until the twenty-first day of January, when he absconded. It is shown by uncontradicted evidence that on the twenty-third day of January, when possession of the treasurer's office was taken by the county auditor, the records of the office showed that Kerseboom had received nearly seventeen thousand dollars more than he had accounted for, and of that amount thirteen thousand one hundred and fifty-eight dollars and ninety-eight cents were collected prior to the close of business on the sixth day of January. The verdict and judgment were for the **308** sum last mentioned and interest. The appellants contend that Kerseboom's first term of office expired on the sixth day of January, 1896, that thereafter he was merely an officer de facto, and the sureties on his official bond are only liable for money collected by him and misappropriated during the term of office covered by the bond, that the evidence fails to show that any of the

funds in controversy were taken during Kerseboom's term of office, and therefore that it was not shown that the sureties are liable. It is said that the failure of Kerseboom to qualify anew before the seventh day of January created a vacancy in his office, and that possession of it should then have been taken by the county auditor, as required by section 788 of the code of 1873; that it will be presumed that the funds for which he was responsible were in his possession at the end of his term, and that the failure of the board of supervisors to prevent his acting as treasurer after the end of his first term, before he had qualified for the second, and the failure of the county auditor to take possession of the office as required by law, would not have the effect to make the sureties liable for wrongs committed after the expiration of the first term. The argument thus made is ingenious, but does not, we think, fully meet the case presented. The conditions of the bond of Kerseboom, as signed by the sureties, were that he should, as treasurer, "render a true account of his office and doings therein to the proper authorities, when required thereby or by law"; that he should "properly pay over to the persons or officers entitled thereto all money which may come into his hands by virtue of his office, and shall promptly account for all balances of money remaining in his hands at the termination of his said office, and shall hereafter exercise all reasonable diligence and care in the preservation and lawful disposal of all moneys, books, papers, and securities and other property appertaining to his said office, and deliver them to his successor, or to any other person authorized to receive the same"; and that he should "faithfully and impartially, without fear or favor, fraud or oppression, discharge ³⁰⁷ all the duties now or hereafter required of his office by law." Those conditions, so far as they are involved in this case, could only have been fulfilled by the payment to the successor of Kerseboom, or to some other officer or person entitled thereto, of the money in controversy. It cannot be said that he paid the money to his successor by retaining it after his right to act as treasurer was at an end, even though he continued to so act: *Wapello County v. Bingham*, 10 Iowa, 39, 74 Am. Dec. 370. It will not be claimed that he could have discharged the obligation of the bond by paying the money after the termination of his office to another, who had assumed without any right whatever to act as treasurer, and yet the case, as presented by the appellants, does not differ in principle from the one suggested; and if it be true that Kerseboom

had all of the money in question in his possession until the close of the sixth day of January, that fact would not relieve his sureties from liability, even though he had the money in his possession on the following day, when he acted as treasurer without right. The conditions of the bond required the payment of the money in question to some one authorized to receive it, and since that has not been done, the sureties continue to be liable on the bond. Since there was no dispute in regard to the material facts involved in this case, the district court properly directed a verdict for the plaintiff, and its judgment is affirmed.

OFFICERS.—THE SURETIES OF A PUBLIC OFFICER, such as a county treasurer, are answerable for his failure to pay over money collected during the term for which they were sureties: See *Crawn v. Commonwealth*, 84 Va. 282, 10 Am. St. Rep. 839; *Board of Administrators v. McKowen*, 48 La. Ann. 251, 55 Am. St. Rep. 275; *Bush v. Johnson County*, 48 Neb. 1, 58 Am. St. Rep. 673.

THILMANY v. IOWA PAPER BAG COMPANY.

[108 Iowa, 357.]

GUARANTY — CONSTRUCTION OF CONTRACT — EVIDENCE.—In an action upon a contract of guaranty, letters written by the plaintiff to his guarantor long after the contract was made, and containing self-serving declarations irrelevant to any issue in the case, are not admissible in evidence to aid in construing the contract where it is clear and unambiguous in its terms.

APPEAL—NONPREJUDICIAL EXCLUSION OF EVIDENCE.—A ruling which denies the admission in evidence of a letter of guaranty is without prejudice where the writing of it is admitted by the guarantor.

AGENCY—OBLIGATION OF PRINCIPAL AND NOT OF AGENT.—A contract of guaranty signed, "Iowa National Bank, by William Daggett, V. P.," is the obligation of the bank, and not of the signer, Daggett, notwithstanding the use of the pronouns "we" and "our" in the contract.

AGENCY—LIABILITY OF AGENT UPON UNAUTHORIZED CONTRACT OF PRINCIPAL.—There is no implied warranty by an agent that his principal has authority to make a contract signed by the agent, and the agent, acting within the scope of his authority, is not answerable upon such a contract where his principal is not bound by it. Hence, as a national bank is not bound by an unauthorized contract of guaranty, an officer or agent of the bank cannot be held personally answerable upon such a contract made by him within the scope of his authority on behalf of the bank.

Action to recover the purchase price of a carload of paper shipped to the company. One Daggett had formerly signed the Iowa National Bank's guaranty of the paper bag company's obligations on account of the paper (see *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa, 333), and he was made a defendant in this case. The plaintiff's petition was dismissed and he appealed.

Senaca Cornell, for the appellant.

McNett & Tisdale, for the appellees.

³⁵⁸ DEEMER, J. Plaintiff claims that defendant Daggett is liable on the written guaranty for two reasons: 1. Because it is his individual contract, was intended to bind him as well as the bank, and was so received and acted upon by appellant; 2. For the reason that, if he intended said guaranty or letter of credit to be the obligation of the bank only, he was acting beyond the scope of his authority as vice-president of the bank, and, failing to bind the bank, is himself ³⁵⁹ liable, as an agent who attempts to bind his principal by a contract he had no authority as such agent to make.

Plaintiff also contends that the court erred in sustaining objections to certain letters written by him to defendant Daggett as vice-president of the Iowa National Bank, on the theory that these letters were essential to a proper construction of the guaranty in suit. We think the objections were properly sustained. The letters were written long after the letter of guaranty was sent to plaintiff, and as it is clear and unambiguous in its terms, they were simply self-serving declarations, irrelevant to any issue in the case. The letter of guaranty was also offered in evidence by plaintiff, but objection thereto was sustained. As defendant Daggett admitted the writing of the letter, the ruling denying its admission was without prejudice.

We now turn to the main points in the case, and first to the proposition that defendant Daggett is liable because of the form of the guaranty. It is signed, "Iowa National Bank, by William Daggett, V. P." Clearly, this is an obligation of the company; and the form of the signature just as clearly indicates that Daggett signed it in a representative capacity, and not as an individual. To hold that the contract binds Daggett personally, we must eliminate the preposition "by," and hold that the initials "V. P." are "descriptio personae." This we cannot do, as it is not our province to make contracts for parties.

The use of the pronouns "we" and "our" in the letter of guaranty is of no significance. They are often used in referring to a corporation as a collection of individuals. There is no question in our minds but that all parties to this contract regarded it as the obligation of the bank, and not of the defendant Daggett in his individual capacity; and as this is the proper legal construction of the instrument, nothing further need be said on the first proposition urged by appellant's counsel.

2. As to the second proposition, the rule has been broadly stated over and over again that when an agent contracts ³⁶⁰ in excess of his authority, or acts without authority, or assumes to have authority when he has none, or for any reason fails to bind his principal, he is himself bound: *Winter v. Hite*, 3 Iowa, 142; *Allen v. Pegram*, 16 Iowa, 163; *Andrews v. Tedford*, 37 Iowa, 314; *Lewis v. Tilton*, 64 Iowa, 220, 52 Am. Rep. 436. That this is the general rule must be conceded, and as applied to the facts of the cited cases, it is correct. But like nearly every other general rule, it is subject to exceptions, some of which we will notice. The reasons generally given for the rule are: 1. That as the agent assumes to represent a principal, he cannot be heard to say that he had no authority, or that there was in fact no principal to be bound; for if he assumes to represent another, he impliedly warrants that there is such another, and that he has authority to represent him. If, then, there is no principal, or the agent has no authority to act for him, an action will lie for deceit or misrepresentation. 2. The law assumes that the contract was intended to bind some one, and if the principal is not bound, the contract must be that of the agent. This last rule is generally applied to executed contracts. In such cases action will lie for benefits received by the agent. Some cases go to the extent of rejecting all parts of the contract relating to the obligation of the principal, and then treat it as the personal contract of the agent. As illustrating this rule, see *Byars v. Doores*, 20 Mo. 284; *Woodes v. Dennett*, 9 N. H. 55; *Terwilliger v. Murphy*, 104 Ind. 32. A third reason for the rule is that the agent impliedly warrants his authority to act for his principal, and if he has no such power, an action lies for breach of warranty. Now, it is apparent that if the party with whom the agent contracts has notice of the facts relating to the authority of the agent, and is as fully advised as to his authority as the agent himself, there can be no action for deceit. And so the text-writers have generally stated this as an exception to the general rule. *Mechem on Agency*, at sections 545 and 546,

thus states the law: "Sec. 545. . . . Of course, ²⁶¹ if the other party knew, or by the exercise of reasonable care might have discovered, the want of authority, he cannot recover. This implied warranty by the agent of his authority must ordinarily be limited to its existence as a matter of fact, and not be held to include a warranty of its adequacy or sufficiency in point of law. Sec. 546. Where Agent Discloses All the Facts Relating to His Authority.—Where, however, the agent, acting in good faith, fully discloses to the other party at the time all the facts and circumstances touching the authority under which he assumes to act, so that the other party, from such information or otherwise, is fully informed as to the existence and extent of his authority, he cannot be held liable. It is material, in these cases, that the party claiming a want of authority in the agent should be ignorant of the truth touching the agency. If he has full knowledge of the facts, or of such facts as are sufficient to put him upon inquiry, and he fails to avail himself of such knowledge, or of the means of knowledge reasonably accessible to him, he cannot say that he was misled simply on the ground that the other assumed to act as agent without authority. Of course, if the agent conceals or misrepresents material facts to the detriment of the other party, he cannot claim exemption." Judge Story, in his valuable work on Agency, section 265, says: "This doctrine, however, as to the liability of the agent, where he contracts in the name and for the benefit of the principal, without having due authority, is founded upon the supposition that the want of authority is unknown to the other party, or, if known, that the agent undertakes to guarantee a ratification of the act by the principal. But circumstances may arise in which the agent would not or might not be held to be personally liable, if he acted without authority, if that want of authority was known to both parties or unknown to both parties." Abundant authorities are cited by each author in support of these propositions. The same thought is equally applicable to the third reason above given for the general rule. And it may be further said that the implied warranty of the agent does not relate to the power of ²⁶² the principal to enter into the particular contract. He simply covenants that he has authority to act for his principal, not that the act of the principal is legal and binding. Hence, it has been justly said that the contract must be one which the law would enforce against the principal, if it had been authorized by him, else the anomaly would exist of giving a right of action against

an assumed agent for an unauthorized representation of his power to make the contract, when a breach of the contract itself, if it had been authorized, would have furnished no ground of action against the principal: *Abeles v. Cochran*, 22 Kan. 406, 31 Am. Rep. 194; *Baltzen v. Nicolay*, 53 N. Y. 467; *Mechem on Agency*, sec. 548; *Snow v. Hix*, 54 Vt. 478. In the case now under consideration the defendant Daggett made no representations as to his authority save that contained in the letter itself. He is guilty of no actionable deceit, unless it be found in the fact that he signed the letter of guaranty as vice-president, and thus represented that he had authority to represent his bank. He had this authority, if any officer of a national bank has it, for no question is made as to his authority to represent the bank in the making of any contract it is authorized to execute. The action is not, then, based upon any misrepresentation as to his authority, but upon the invalidity of the contract itself as between plaintiff and the bank. There was no actionable deceit, for the plaintiff is presumed to know as much about the powers of national banks as the defendant. There is, as we have said, no implied warranty by an agent that his principal has authority to make the contract. As a rule, that is a question of law, of which each party has equal knowledge. In the case against the bank we held that national banks have no authority to enter into such contracts, and as the plaintiff has no right of action against the bank upon a contract of guaranty, such as the one in suit, no recovery should be permitted against the agent; for this would hold every agent to a warranty of legality of his principal's contracts. As we have seen, this is not the obligation of the agent. The second reason sometimes given for the ³⁶³ general rule of liability of the agent does not appear to us to be sound. By the application of this principle a new contract is made for the parties. An engagement is created which the parties did not intend to assume, and the decided weight of authority is against such rule: See *Hall v. Crandall*, 29 Cal. 568, 89 Am. Dec. 64; *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *Duncan v. Niles*, 32 Ill. 532, 83 Am. Dec. 293; *Stetson v. Patten*, 2 Me. 358, 11 Am. Dec. 111; *Abbey v. Chase*, 6 Cush. 56; *White v. Madison*, 26 N. Y. 117; *McCurdy v. Rogers*, 21 Wis. 199, 91 Am. Dec. 468. We should be slow to adopt any rule which would bind a party who did not by the terms of his contract agree to become responsible. Indeed, the question seems to be put at rest, so far as this court is concerned, in *Willett v. Young*, 82 Iowa, 292.

The rules herein announced are not in conflict with any of the previous decisions of this court. The case of *Winter v. Hite*, 3 Iowa, 142, related to the contract of an executrix, and it is there said that such cases should not be confounded with those of agency. In the case of *Andrews v. Tedford*, 37 Iowa, 314, the question was left undecided. *Allen v. Pegram*, 16 Iowa, 163, was an action against an agent who assumed to act for a principal that had no existence; and so was *Lewis v. Tilton*, 64 Iowa, 220, 52 Am. Rep. 436. These cases come clearly within the general rule first announced. In other cases cited by appellant's counsel the agent was held liable because of the form of his signature. They have no application to the question before us. We do not think that Daggett, the agent, is personally liable under the facts disclosed, and the judgment is affirmed.

GUARANTY—CONSTRUCTION OF CONTRACT—EXTRINSIC EVIDENCE.—A guaranty is to be construed according to what is fairly presumed to have been the understanding of the parties: *Hooper v. Hooper*, 81 Md. 155, 48 Am. St. Rep. 496. If the contract is plain, clear, and definite, extrinsic evidence is not admissible to vary its terms or meaning: *Crane Co. v. Specht*, 39 Neb. 123, 42 Am. St. Rep. 562, and note thereto showing that extrinsic evidence as to the meaning of a contract is inadmissible if there is no ambiguity on its face respecting its meaning.

AGENCY—CORPORATIONS—LIABILITY OF AGENT ON CONTRACT ULTRA VIRES.—In case of no misrepresentation upon any matter of fact officers and agents of a corporation cannot be made personally answerable because a contract which they have sought to enter into on behalf of the corporation is ultra vires; and there is a growing inclination to consider an instrument as it would manifestly be understood by the average business man, or, in other words, as it was most probably understood by the party receiving and the party signing it, and to exonerate the latter from liability, when, according to such construction, it appears to the court that he did not intend, and was not understood, to bind himself, but to act for the corporation of which he was the authorized agent: See monographic note to *Greenberg v. Whitcomb Lumber Co.*, 48 Am. St. Rep. 915, 919, on the personal liability of officers of corporations to third persons.

AGENCY—CORPORATIONS—OBLIGATION OF PRINCIPAL AND NOT OF AGENT.—When officers of a corporation execute a contract the official designation after their names shows that they were not acting in their personal capacity, and where their names are also preceded by the name of the corporation, it sufficiently appears that the obligation is executed by them on behalf of the corporation, and not on behalf of themselves: See notes to *Greenberg v. Whitcomb Lumber Co.*, 48 Am. St. Rep. 919, and *Means v. Swormstedt*, 2 Am. Rep. 338, showing when the use of the pronoun "we" in the contract is of no significance.

BYRAM v. SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD.

[108 Iowa, 430.]

BENEFICIAL ASSOCIATIONS—EXPULSION OF MEMBERS—WHEN UNAUTHORIZED AND VOID.—A benefit association having by-laws which prescribe a method for expelling its members must be governed by them. Hence, the expulsion of a member by a mere vote of the order, upon a motion made for that purpose, is void when the by-laws require charges in writing to be preferred and notice thereof to be served on him, as well as notice of the time and place of trial.

BENEFICIAL ASSOCIATIONS — EXPULSION — WHEN VOID—JURISDICTIONAL FACTS.—If a member of a benefit association is entitled, under its by-laws, to have charges in writing preferred and notice thereof served on him, as well as notice of the time and place of trial, these are jurisdictional facts which the association cannot disregard. Hence, an expulsion without written charges, without notice of charges, without trial, and without a finding of guilt, but upon a mere motion and a vote of the order, is without authority and void.

BENEFICIAL ASSOCIATIONS—EXPULSION—ACQUIESCENCE—WHAT IS NOT.—When a benefit association wrongfully attempts to expel a member thereof, without complying with its procedure in cases of expulsion, the presence of the member when a motion is made for his expulsion, and his failure to object to the unauthorized proceeding or to the jurisdiction of the order to expel him, cannot be construed into an acquiescence in the proceeding, for it is void.

BENEFICIAL ASSOCIATIONS—EXPULSION—WHEN INEFFECTUAL—RESORT TO COURTS.—If a local camp of Woodmen of the World attempts in an unauthorized manner to expel a member thereof, to whom a benefit certificate has been issued, he must exhaust all remedies of the association before resorting to the courts, but the exercise of his right of appeal to the sovereign commander and that officer's approval of the action of the local camp do not make the member's expulsion effectual.

BENEFICIAL ASSOCIATIONS—EXPULSION—EXHAUSTING REMEDIES—RESORT TO COURTS.—When a local camp of Woodmen of the World attempts in an unauthorized manner to expel a member thereof, to whom a benefit certificate has been issued, the member has not failed to exhaust all remedies of the association before resorting to the courts for redress, in not taking an appeal from the sovereign commander to the sovereign camp, where no provision is made for such an appeal.

BENEFICIAL ASSOCIATIONS—ACTION ON CERTIFICATE AFTER ILLEGAL EXPULSION—MAINTENANCE OF.—An action may be maintained by a beneficiary named in a certificate of a benefit association, where proceedings void for want of jurisdiction were had in the member's lifetime for his expulsion, and he was not therefore expelled, although the order would not recognize the member's right to pay assessments or his connection with the association, and there was no reinstatement by mandamus or otherwise.

BENEFICIAL ASSOCIATIONS—ACTION ON CERTIFICATE AFTER ILLEGAL EXPULSION—DEFENSE.—It is no de-

fense to an action brought by a beneficiary named in a certificate of a benefit association that the member failed in his lifetime to pay an installment of dues where the order had proceeded to expel him, but in an unauthorized way, and would not receive his dues, thus causing the default of which it seeks to take advantage.

BENEFICIAL ASSOCIATIONS—ACTION ON CERTIFICATE BY FATHER AS BENEFICIARY.—A father designated as the beneficiary in a certificate of a benefit association is authorized to sue for the benefit, although the member was a minor at the time of his death, and left a wife and child surviving him, where the by-laws of the association included the father among those whom a member might designate as his beneficiaries.

Action on a benefit certificate. The plaintiff appealed from a judgment for the defendant.

George Wambach, for the appellant.

Brome & Burnett, for the appellee.

⁴³² GRANGER, J. 1. The plaintiff was the father and is the beneficiary named in the certificate in suit issued by the defendant association to Elbert W. Byram on the tenth day of August, 1894. It secures to the beneficiary the sum of one thousand dollars at the death of Elbert W. Byram on specified conditions. Elbert W. Byram, by due course of procedure, became a member of Lone Pine Camp No. 85, at Diagonal, Iowa, and he died about September 4, 1896, and this action is to recover the amount of the certificate. The answer pleads expulsion, non-payment of dues, and other matters that may be noticed in considering different questions. The facts are stipulated, except that as to some proofs exceptions were taken to their admission. It will be well to notice some facts bearing directly upon the question of the certificate being avoided because of the expulsion of Elbert W. Byram from the association. About February, 1896, Byram became a member of Lone Pine Camp No. 85, and was for a time thereafter clerk of the camp, and while such clerk he used five dollars and fifty cents of the funds in his hands. The purpose of its use is somewhat in dispute, it being his claim at that time that he used it for stamps, stationery, etc., for the camp, for which he expected the camp to allow him. The following facts appear upon the stipulation: "Verbal notice was given to said Elbert W. Byram by Ira G. Morrison, clerk of Lone Pine Camp No. 85, three days prior to the eighteenth day of July, 1896, that at the regular meeting of said camp held on July 18, 1896, a motion would be made and entertained to expel him from the order on ⁴³³ account of his having theretofore appropriated the funds of the camp, and he was then and there

requested by said Morrison to be present at said meeting and show cause, if any, why he should not be expelled. That no charge of any kind or charges were filed or preferred against the said Elbert W. Byram in writing, and that proceedings had upon such expulsion were had in the manner following, to wit: On the eighteenth day of July, 1896, a regular meeting was had of said camp, and the said Elbert W. Byram being present, a motion was made and seconded that on account of and for the reason that Elbert W. Byram has heretofore, as found and reported by the board of managers, misappropriated the funds of the camp to his own use, to the amount of five dollars and fifty cents, that he be expelled from the order. That while said motion was being discussed, and after the same had been made in the presence and hearing of said Elbert W. Byram, the said Elbert W. Byram became angry and left the meeting. Thereupon said motion was submitted to a vote of the members remaining present at such meeting, and was carried by unanimous vote of all members present; that no notice was given the members of the said local camp of the contemplated expulsion of the said Elbert W. Byram, and that not all the members were present at the meeting at which the motion was made." In pursuance of such action official notice was at once given Byram of his expulsion, and that thereafter he would in no way be connected with the order. From such action Byram appealed to the sovereign commander, who sustained the action of the camp. Assessments and dues to the amount of two dollars and fifteen cents that had been paid by plaintiff were returned to him July 23, 1896, because of such expulsion. A very important question is asked as to the legality of the expulsion. If valid, it concludes a right of recovery by plaintiff by the terms under which the certificate issued. It is not an open question that the membership of Elbert W. Byram in the association created contractual relations, so that ⁴³⁴ the rights and obligations of the parties are to be controlled thereby. By the terms of the certificate, the constitution, fundamental laws, and the by-laws of the association became a part of the contract of membership, and one express provision is that expulsion shall forfeit the certificate. This is not questioned. Appellant's position is that the laws of the association, being a part of the contract, prescribe the method of expulsion, and that it could not be effective on a mere motion, as was done in this case. The laws are in the record, and they make express provisions for procedure in cases of complaints, and among them it is provided that, upon informa-

tion to warrant it, charges in writing shall be presented to the camp, and service of a copy thereof be made on the accused, and the details of investigation are quite definitely prescribed. It is expressly provided that after investigation a vote shall be taken upon the question, "Have the charges been sustained?" and a two-thirds vote is necessary to sustain them. If sustained, then the camp may impose the penalty, and among the penalties prescribed is that of expulsion by a two-thirds vote. The expulsion in this case was without any reference whatever to such a procedure, and without any charges or findings of guilt. A board of managers had reported a misappropriation of funds by him, nothing further appearing in regard thereto, and thereupon he is expelled on motion. Not a jurisdictional fact appears to justify the action of the camp, or the sovereign commander on appeal. That the preferment of charges and a notice thereof, and of the time and place of trial, are jurisdictional facts, no one should even doubt. They were as much required of the association as a condition on which it had authority to act in the matter of expulsion as was Byram required to pay his assessments and dues in order to be in good standing in the association. These duties as to both arose from the terms of the contract of membership. Appellee urges that the presence of Byram when the motion was adopted for his expulsion, and his acquiescence in such action ⁴³⁵ by receiving back the moneys paid by him on account and dues and assessments after a certain date; his not having objected in any manner to the proceedings, or the jurisdiction of the camp to try him, except that he made restitution of the money misappropriated, and his taking an appeal to the sovereign commander, have waived all objection to the procedure and he stands legally expelled. It is true that Byram received a verbal notice from the clerk that a motion would be made at the regular meeting of the camp for his expulsion because of the misappropriation of funds, and for him to be present and show cause why he should not be expelled. It was not a notice that he was under charges or of the hearing, but in so far as the notice conveyed any idea, it was that there had been such proceedings as that he was found guilty, and the camp would act on the question of his expulsion, and he might show cause against it. In *People v. Musical etc. Union*, 47 Hun, 273, where the by-laws required that charges should be preferred, a copy of which should be served on the member charged, and a notice was given but no charges preferred, it was held that, in the absence of charges, a notice to appear and show

cause why he should not be expelled gave no authority to expel him. It is said in the opinion: "Membership in this organization was attended with valuable rights and privileges, and the relator could not be deprived of them without a reasonably plain case being made against him, and specifications stating it, previously served upon him, allowing evidence to be taken to prove that case." In *Downing v. Society*, 10 Daly, 262, it is said: "It has been decided that, though a member attends and enters upon his defense, he does not waive his right to a notice of the charges." It cites *Marah v. Huron College*, 27 Grant U. C. 605; *Labouchere v. Earl of Wharnccliffe*, 13 Ch. Div. 346; *Fisher v. Keane*, 11 Ch. Div. 353. In *Mulroy v. Supreme Lodge*, 28 Mo. App. 463, the court makes special reference to the contractual relations of the parties, and deals with the limitations on the society because ⁴³⁶ of such relations, and it is said: "In a society such as this the members to whom benefit certificates are issued acquire property rights in the society of a very important character; and in dealing with these rights it is highly essential that the courts should confine themselves strictly to the terms of the contract which the members have made among themselves. . . . We hold in this case, as we have held in other cases of this kind, that the rights of the beneficiary in such a certificate are strictly a matter of contract; that this contract is to be found in the terms of the certificate itself, in the statutes of the society, and, in the case of a society incorporated under the law of this state, in the statutes of this state, relating to such societies." The case holds an expulsion invalid because not conformable to the contract as thus defined, the ground of expulsion not being one specified in the contract, and it is said the proceeding was without jurisdiction of the subject matter. It will thus be seen that in such proceedings by a society, to make its judgment valid, it must conform to its contract in the particulars essential to jurisdiction both of the person and subject matter, in the absence of which its proceedings are void. It would be difficult to imagine a clearer departure from jurisdictional requirements than in this case, the proceeding being without charges, without notice of charges, without trial, and without a finding of guilt in the way the association had obligated itself to do. The presence of Byram when the motion was made to expel him can in no way be construed into an acquiescence in such a proceeding. It appears that while the motion was being discussed he became angry and left the meeting. The cause of his anger is not shown, and we have no occasion

for assumption in regard to it. It is sufficient to say that while, as to mere matters of irregularity in a proceeding in which the association was acting within the scope of its authority, the presence or acquiescence of the accused might excuse or waive what might otherwise be erroneous, such a rule never obtains in a proceeding void for want of authority to act.

⁴³⁷ 2. From the action of the camp expelling him Byram appealed to the sovereign commander, who affirmed the action of the camp, and it is thought the taking of this appeal makes effectual his expulsion. We have seen no authority announcing such a rule, but, on the contrary, there is a line of authorities holding that where the right of appeal exists, it must be exhausted before there can be a resort to the courts, on the theory that the member should first obtain redress, if it can be done, under the laws of the association: *Karcher v. Supreme Lodge*, 137 Mass. 368; *Lafond v. Deems*, 81 N. Y. 508; *Harrington v. Association*, 70 Ga. 340. Whether or not such a rule obtains in a case where the association acts wholly without authority, so that its proceeding is void, we need not determine, for an appeal was taken in this case. We may properly, in this connection, consider the claims of the appellee that the failure to appeal from the sovereign commander to the sovereign camp avoids plaintiff's right to complain of the action of the association in this action. We find no provision for such an appeal. Appellee refers to section 139 of the laws of the association, but it makes no provision for an appeal to the sovereign camp, but does provide for one from a camp to the sovereign commander. It is true that the section provides that the decision of the sovereign commander shall be final unless reversed by the sovereign camp, but we understand that the sovereign camp acts upon the decisions of the sovereign commander without an appeal; or, perhaps, in better terms, we understand the appeal to the sovereign commander to take the case in due course of procedure to the sovereign camp, because the sovereign commander is the chief executive officer of the sovereign camp, presides at its meetings, and is required by law to make reports of his transactions to each meeting of the sovereign camp. It is in this way that his decisions are brought before the sovereign camp for review, and not by a direct appeal. It is urged that Byram, on his appeal to the ⁴³⁸ sovereign commander, did not present the question of the irregularity of the proceedings, but merely urged his case on its merits, by a correspondence. However that may be, the sovereign commander did consider the question of the regu-

larity of the proceedings, for he says: "I corresponded with the camp, and through its clerk, Sovereign Ira Morrison, was fully advised as to the proceedings in the case, which appear to be regular and the evidence sufficient to justify expulsion." No one in this court contends, nor could they with reason, that there was even a semblance of regularity in the proceedings. On the contrary, the facts conclusively show an entire absence of regularity and an absolute disregard of law. There was no charge, no notice of a charge, no evidence, and no findings of guilt; all of which are specifically provided for in the prescribed method of procedure. It seems certain that either the camp falsely presented the facts to the sovereign commander, or he has falsified them in his statement. The law seems to contemplate that the review by the sovereign commander of a case on appeal shall, or at least may, be on a written abstract of the record of the camp from which the appeal is taken, which the sovereign commander may require the clerk of the camp to send him; and one was required in this case. There does not seem to be any requirement that the accused who appeals must present objections to the record, or waive them, and especially where the proceedings are void for want of jurisdiction.

3. The expulsion was July 18, 1896, the approval thereof by the sovereign commander was August 27, 1896, and E. W. Byram died September 4, 1896. Prior to the expulsion his dues and assessments had been paid for May, June, and July of that year, to the amount of two dollars and fifteen cents, which amount was, on July 23d, returned to plaintiff because of the expulsion. By the laws of the association, the assessment for August, 1896, became due on the 10th of the month, and payment thereof was required, without ⁴³⁹ notice, of all members in good standing, and a failure of payment operated as a suspension so as to avoid the certificate. It is now urged that the failure to pay the August assessment is fatal to recovery. The record is a conclusive showing that at all times the plaintiff was willing and anxious to pay all dues required of members in good standing, and was urging the invalidity of the expulsion both to the local camp and the sovereign commander; and the showing is just as conclusive that at all times after the attempted expulsion, the local camp and the sovereign commander were treating Byram as expelled, and would in no way recognize his right to pay assessments, or his connection with the association. All dues and assessments have been tendered in this case. In now urging a default in the payment of the August assessment,

the association is in the attitude of saying: "We regarded you as expelled, with no right to pay dues, and you would, but could not, pay them, for we would not receive them; and yet, for not paying them, you have forfeited your membership." We have yet to learn that the law ever justified such a claim by any person or association. The unlawful and void proceedings in an attempt to expel Byram forced the situation resulting in the nonpayment of the assessment, and the persistence of the association in its unlawful course caused the default of which it now seeks to take advantage. To permit it would be to stifle the familiar legal maxim that no one should be permitted to take advantage of his own wrong.

4. It is thought that, in view of the expulsion, plaintiff cannot maintain this suit, because there was no reinstatement, by mandamus or otherwise, of E. W. Byram during his lifetime. The mistake is as to the facts. He was not expelled. The proceeding was void, and Byram was at all times a member in good standing: See authorities above cited.

5. E. W. Byram was a minor at the time of his death—that is, under twenty-one years of age—but had married, and ⁴⁴⁰ left at his death a wife then pregnant, and a child was thereafter born. It is now urged that, as he was a minor, and a wife and child survived him, the designation of his father as a beneficiary is void, on the theory that the designation is of a testamentary character. The laws of the association provide who may be beneficiaries of its members, and within the limitation of the provision the member may make the designation. A father is included among those who may be designated. Our law then, as well as now, provided who could become members of such an association in respect to age, and only persons under the age of fifteen and over the age of sixty-five years are excluded; and the same law provides who may be beneficiaries of members therein, and a father is included: Code, sec. 1824. There is nothing to indicate that, as to members, all have not the same authority as to designation of beneficiaries. It seems to be the purpose of the law to invest persons fifteen years of age with contractual authority for the purposes of such membership, and to divest persons over sixty-five years of such authority. In view of these provisions of the law we regard the plaintiff as the proper party in interest, and authorized to maintain the suit. There should be a judgment for plaintiff and the cause is remanded therefor.

Reversed.

BENEFICIAL ASSOCIATIONS—EXPULSION OF MEMBER IS VOID, WHEN.—One expelled from a mutual benefit society may recover upon a certificate of insurance issued to him by the association where he has not been convicted in accordance with the rules of the society, nor under general principles of law, as his membership still continues. So, the suspension or expulsion of a member of a benefit association, without a hearing or trial, is void and no bar to a suit by the beneficiary to recover the insurance money: Supreme Lodge K. of P. v. Eskholme, 59 N. J. L. 255, 59 Am. St. Rep. 609; note to Weiss v. Musikai etc. Union, 69 Am. St. Rep. 827.

BENEFICIAL ASSOCIATIONS—EXPULSION OF MEMBER—DUTY AS TO EXHAUSTING REMEDIES OF ORDER.—The duty of an expelled member of a mutual benefit society to exhaust, by appeal or otherwise, all the remedies within the organization arises only where the association is acting strictly within the scope of its powers: Supreme Lodge K. of P. v. Eskholme, 59 N. J. L. 255, 59 Am. St. Rep. 609.

BENEFICIAL ASSOCIATIONS.—THE BENEFICIARY DESIGNATED in a benefit certificate must be one of the class named where the statute, charter, or by-laws have provided who shall be the beneficiaries: Notes to Carson v. Vicksburg Bank, 65 Am. St. Rep. 601; Lake v. Minnesota etc. Assn., 52 Am. St. Rep. 571; and the person named is entitled to the amount due at the death of the member, to the exclusion of his children: Independent Order etc. of Jacob v. Allen, 76 Miss. 326, 71 Am. St. Rep. 532. Compare the monographic note to Lake v. Minnesota etc. Assn., 52 Am. St. Rep. 543-578, on features of the law specially applicable to mutual or membership life or accident insurance.

HEACOCK v. HEACOCK.

[108 Iowa, 540.]

HUSBAND AND WIFE.—THE LEGAL FICTION of the oneness of husband and wife has not been entirely effaced by the statutes of Iowa.

HUSBAND AND WIFE—DISABILITIES OF—HOW FAR REMOVED.—All disabilities which the common law imposes upon husband and wife by reason of the marriage status still exist in Iowa, except in so far as they have been modified or changed by express statutory enactment.

HUSBAND AND WIFE—SHE CANNOT SUE HIM ON HIS PERSONAL CONTRACT.—Under the statutes of Iowa, a wife has no right of action against her husband, except for the preservation or protection of her separate property. She cannot sue him on his personal contract, such as a note made by him to her during coverture.

HUSBAND AND WIFE—ACTIONS BY HER AGAINST HIM—CONSTRUCTION OF STATUTES.—Statutes which authorize a wife to maintain an action to recover property belonging to her, the possession or control of which has been obtained by her husband, or which permit her to prosecute all actions "for the preservation and protection of her rights and property," or which authorize her, in general terms, to enforce contracts made by her as

if unmarried, do not authorize her to sue her husband on his personal contract made with her.

HUSBAND AND WIFE—WANT OF REMEDY PRECLUDES HER FROM SUING HIM ON HIS PERSONAL CONTRACT.—A wife who has no remedy against her husband, except for the infraction of some of her property rights, cannot sue him on his personal contract made with her.

HUSBAND AND WIFE—CONTRACTS BETWEEN—VALIDITY OF.—A statute providing that "contracts may be made by a wife and liabilities incurred, and the same enforced by or against her to the same extent and in the same manner as if she were unmarried," has reference to contracts with persons other than her husband. His disabilities must also be removed before a contract between him and her would be valid.

HUSBAND AND WIFE—HER RIGHT TO CONTRACT WITH HIM—LIMITATION UPON.—Married women can contract with their husbands only in matters relating to their separate estates.

HUSBAND AND WIFE—HER RIGHT TO CONTRACT WITH HIM—CONSTRUCTION OF STATUTE.—Statutes relating to the separate property of a married woman and her right to her real and personal property do not give her a right to personally contract with her husband.

HUSBAND AND WIFE—ACTION BY HER ON HIS CONTRACT—WHAT SHE MUST PLEAD AND PROVE.—In an action by a wife against her husband upon a contract made between them, she must plead and prove that the contract was with reference to her separate estate, for no particular consideration will be presumed, although the contract is in writing.

Action to recover interest alleged to be due upon an instrument in writing. A demurrer to the petition was overruled. The defendant refused to plead further and judgment was rendered for the plaintiff. The defendant appealed.

J. M. Wormley and I. S. Struble, for the appellant.

Ira T. Martin, for the appellee.

641 **DEEMER, J.** A copy of the instrument upon which this action was brought is as follows:

"1,000.00.

Kingsley, Io., May 20, 1893.

"I promise to pay Luella Heacock (my wife) one thousand dollars, value received, with interest thereon at the rate of 6 per cent per annum, payable annually. This note becomes due at my death, and to be paid her out of the estate, aside from her lawful dowry. In case of her death before mine, this note becomes void. Should any of the interest not be paid when due, it shall bear interest at the rate of 6 per cent per annum. It is also stipulated that should the collection of this note be enforced by law, a reasonable amount shall be allowed as attorneys' fees, and taxed with the costs in the cause.

(Signed) "J. J. HEACOCK."

The plaintiff admits the payment on the instrument of twenty-five dollars as interest, and seeks to recover one hundred and sixty-seven dollars and ninety-two cents as interest due December 8, 1896, and unpaid, and interest on that sum.

The first ground of the demurrer is that the petition does not show that the plaintiff can maintain this action, for that she is the wife of the defendant, and it is not shown that the instrument sued on was given for money loaned by the plaintiff to the defendant or for property of the plaintiff, the possession or control of which had been obtained by the defendant. While the legislature of this state has made many and very radical changes in the common law relating to husband and wife, yet it is a serious mistake to assume that the legal unity or oneness of husband and wife has been entirely obliterated by our statutes. Indeed, there is no state that has gone to such an extent: *McKee v. Reynolds*, ⁵⁴² 26 Iowa, 582; *Jones v. Crosthwaite*, 17 Iowa, 393. A wife cannot, in the absence of express agreement, recover money of hers spent by her husband for the use of the family or to promote his business: *Patterson v. Hill*, 61 Iowa, 537; *Hanson v. Manley*, 72 Iowa, 51; *Courtright v. Courtright*, 53 Iowa, 57. The husband owes his wife nothing for services performed by her: *Grant v. Green*, 41 Iowa, 88; *Van Doran v. Marden*, 48 Iowa, 188. The wife's time, outside of her separate business, belongs to her husband: *Miller v. Dickinson County*, 68 Iowa, 102; *Lyle v. Gray*, 47 Iowa, 154; *Fleming v. Shenandoah*, 67 Iowa, 508, 56 Am. Rep. 354. The husband's creditors may take all that his wife accumulates outside her separate business: *Hamill v. Henry*, 69 Iowa, 752. Husband and wife cannot contract with each other to secure the performance of their marital rights and duties: *Miller v. Miller*, 78 Iowa, 177, 16 Am. St. Rep. 432. The law presumes that the influence of the husband over his wife is such that she is not held criminally liable for acts done by her in his presence: *State v. Kelly*, 74 Iowa, 589. And the husband is under obligations to support his wife, and is entitled to her earnings: *Thill v. Pohlman*, 76 Iowa, 638; *Tibbetts v. Wadden*, 94 Iowa, 173; *Rafferty v. Buckman*, 46 Iowa, 201; *Porter v. Briggs*, 38 Iowa, 166, 18 Am. Rep. 27. In the case of *Peters v. Peters*, 42 Iowa, 182, it is expressly held that neither the husband nor the wife can sue the other for a tort committed during coverture. This same conclusion has been reached by other courts in construing similar statutes: *Libby v. Berry*, 74 Me. 286, 43 Am. Rep. 589; *Barton v. Barton*, 32 Md. 214; *Freethy v. Freethy*,

42 Barb. 641; *Schultz v. Schultz*, 89 N. Y. 644. These cases teach the following doctrines: 1. That the legal fiction of the oneness of husband and wife has not been entirely effaced; and 2. That all disabilities which the common law imposes upon husband and wife by reason of the marriage status still exist, except in so far as they have been modified or changed by express statutory enactment. As sustaining these conclusions, see, also, *Robertson v. Bruner*, 24 Miss. 242; *May v. May*, 9 Neb. 16, 31 Am. Rep. 399; ⁵⁴³ *Diver v. Diver*, 56 Pa. St. 109; *Bertles v. Nunan*, 92 N. Y. 159, 44 Am. Rep. 361. Now, at common law neither the husband nor wife could sue the other at law nor could they enter into contracts with each other. Public policy, originating in the delicate relation existing between husband and wife, forbade the wife from maintaining an action at law against her husband: *Barton v. Barton*, 32 Md. 214; *Russ v. George*, 45 N. H. 467; *Powers v. Lester*, 23 N. Y. 527. Contracts between them were void because of defect of parties, and both husband and wife labored under the disability: *Aultman v. Obermeyer*, 6 Neb. 260; *White v. Wager*, 25 N. Y. 328.

Have these disabilities been removed by our statutes, and, if so, to what extent? And first as to the right to sue: The only sections giving the wife a right of action against her husband are sections 2204 and 2211 of the code of 1873, which read as follows:

"Sec. 2204. Should either the husband or wife obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and extent as if they were unmarried."

"Sec. 2211. A wife may receive the wages of her personal labor and maintain an action therefor in her own name, and hold the same in her own right; and she may prosecute and defend all actions at law or in equity for the preservation and protection of her rights and property, as if unmarried."

In construing these sections, Judge Day, speaking for the court in *Peters v. Peters*, 42 Iowa, 182, said: "Whilst it must be admitted that very radical changes have been made in the relation of husband and wife, still it seems to us that these changes do not yet reach the extent of allowing either husband or wife to sue the other for personal injury committed during coverture. . . . It is evident that section 2211 refers to and authorizes actions against parties other than the husband; for,

if this section allows an action generally against ⁵⁴⁴ the husband, it covers and embraces more than is included in section 2204, and that section is rendered useless and meaningless. Whatever right of action exists against the husband must therefore be found in section 2304. This section is limited to actions for property, or rights growing out of the same." The holding in that case has never been questioned, and it seems to us it firmly establishes the doctrine that the wife has no right of action against her husband, unless it be for the preservation or protection of her separate property: See, as further sustaining these conclusions, *Chestnut v. Chestnut*, 77 Ill. 346; *Jenne v. Marble*, 37 Mich. 319; *Pittman v. Pittman*, 4 Or. 298. If she has no right to sue—no remedy—she has no right: *Broom's Legal Maxims*, 8th ed., 191, and cases cited; *Ahby v. White*, 2 Ld. Raym. 953; *Howe v. Wildes*, 34 Me. 566; *People v. Dikeman*, 7 How. Pr. 130. As she has no remedy against her husband, unless it be for the infraction of some of her property rights, she cannot sue him on his personal contract.

This ought to end the case, but as reliance is placed upon section 2213 of the code of 1873, it is perhaps well to consider that section. It reads as follows: "Contracts may be made by a wife and liabilities incurred, and the same enforced by or against her to the same extent and in the manner as if she were unmarried." It is said that this section authorizes any kind of contracts between husband and wife. We do not think so. Both husband and wife were under such legal disabilities at common law as that they could not contract with each other. To remove the disability of one will not validate the contract, for one of the contracting parties has no assenting mind; and it would be strange doctrine to announce that, because the disability was removed from one of the contracting parties, the contract is good, although the other is without a concurring mind. The statute undoubtedly has reference to contracts with persons other than her husband; for, as said by Denio, J., in the case of *White v. Wager*, 25 N. Y. 328: "No doubt, there ⁵⁴⁵ was an intention to confer upon the wife the legal capacity of a feme sole, in respect to conveyances of her property, but this does not prove that she can convey to her husband, for no such question could possibly arise in respect to a feme sole; there being no person to whom, in respect to conveyance made by her, the rule of the common law could apply. But assimilating the case of a wife to that of an unmarried woman, the legislature merely meant to say that she should have the same power

as though she were not under the disability of coverture. Taking away that disability, she would have power to make all such conveyances as were not forbidden by special provision of law; but such general statutes are never understood to overreach particular prohibitions, founded on special reasons of policy or convenience. Corporations cannot, in general, take title to lands by will. The removing of the disability of *femes covert* would not allow them to make a devise to a corporation not authorized to take. It is not the disability of the wife alone which would, by the common law, render void her conveyance to her husband. The husband is as much disabled to take under such a conveyance as she was to convey. Therefore, to render the conveyance valid, the husband's disability, as well as that of his wife, must be removed; but, as has been remarked, there is no language in these acts and nothing in their apparent intention which looks to the removal of any disabilities under which he labored." That case was cited with approval by this court in *McKee v. Reynolds*, 26 Iowa, 582, and *Jones v. Crosthwaite*, 17 Iowa, 393, and we think the reasoning is unanswerable: See, as sustaining the same doctrine, *Aultman v. Obermeyer*, 6 Neb. 260; *Lord v. Parker*, 3 Allen, 127; *Savage v. O'Neil*, 42 Barb. 374; *Hoker v. Boggs*, 63 Ill. 161; *Knowles v. Hull*, 99 Mass. 562; *Real Estate Inv. Co. v. Roop*, 132 Pa. St. 496; *Roby v. Phelon*, 118 Mass. 542. There are cases holding to the contrary, but they all seem to be based on an assumed legislative intent. If it were the intent of the legislature of this state ⁵⁴⁶ to permit married women to contract with and sue their husbands, such intent could be clearly expressed in a very few lines. That such course was not pursued is the best evidence that this was not the intent of the general assembly. Moreover, we can only arrive at the legislative intent by construing the language used in the light of previous decisions and of the well-settled rules of construction. Applying these rules and decisions, we think it is clear that married women can only contract with and sue their husbands in matters relating to her separate estate. Consideration of all the statutes heretofore set out inevitably leads us to the conclusion that this was the intent of the legislature. The code of 1897 contains the identical sections to which we have referred, without change. They were passed with the case of *Peters v. Peters*, 42 Iowa, 182, in mind, and it is evident that the legislature considered that case a correct exposition of the statutes as they had theretofore existed, and re-enacted the statutes with that in view.

We have not referred to the statutes relating to a married woman's separate property and her right to her real and personal property, for it is uniformly held that such statutes do not give the right to a married woman to personally contract with her husband: *Jenne v. Marble*, 37 Mich. 319; *Albion v. Lord*, 39 N. H. 196; *Ballin v. Dallaye*, 37 N. Y. 35; *Norris v. Iantz*, 18 Md. 260; *O'Daily v. Morris*, 31 Ind. 111; *Pond v. Carpenter*, 12 Minn. 430; *Ames v. Foster*, 42 N. H. 381. There is no conflict in the authorities on this proposition. Hence, consideration of the statutes relating to these matters would be useless.

As the contract in suit is invalid and cannot be enforced unless it relates to the wife's separate estate, the burden is on plaintiff to both plead and prove that fact. The cases all hold that the common-law rules, although for the greater part done away with by equity and by statute, still so far exist that any capacity of married women to contract is regarded as exceptional, and the grounds therefor ⁵⁴⁷ must be both alleged and proved by one seeking to recover: *Hinkson v. Williams*, 41 N. J. L. 35; *Stillwell v. Adams*, 29 Ark. 346; *Way v. Peck*, 47 Conn. 23; *Tracy v. Keith*, 11 Allen, 214; *West v. Laraway*, 28 Mich. 464; *Pollen v. James*, 45 Miss. 129; *Nash v. Mitchell*, 71 N. Y. 199, 27 Am. Rep. 38. In the case of *Rodemeyer v. Rodman*, 5 Iowa, 426, we held in effect that, *prima facie*, a married woman is still unable to contract, to sue or be sued, and that when she seeks to recover she must plead the exception which allows her to recover. But it is said that the law presumes a consideration for the note, and that this presumption is sufficient. It is true that all contracts in writing, signed by the party to be bound, import a consideration: Code 1873, sec. 2113. But this statute was enacted for the purpose of giving to instruments in writing the same effect as instruments under seal had at common law, and not to supply proof that the contract was based upon a particular consideration. In effect, it simply dispenses with proof that a written instrument was based on a consideration: 1 *Parsons on Contracts*, 8th ed., 441, note u; 2 *Smith's Leading Cases*, 456. If there could be no other consideration for the instrument in suit than the wife's separate property, then this presumption might avail her. But it is evident there may have been other considerations which were perfectly valid, and which would have supported the note had it been in the hands of a third person. As no particular consideration is presumed, the burden is upon the wife to show that

the contract was with reference to her separate estate. This is, in effect, the holding in the case of *Logan v. Hall*, 19 Iowa, 491. In that case plaintiff proved that the note was given for her separate estate. We are firmly of the opinion that the petition does not state a cause of action, and that the judgment should be reversed.

ROBINSON, C. J., DISSENTED, and in the course of his opinion said: "The statutes of this state authorize contracts between husband and wife in regard to most subjects concerning which persons not standing in that relation have occasion to contract. Among such contracts are those which relate to conveyances and transfers of property, and the many rights which may be incident to the exercise of such powers: Code, sec. 3157. Husband and wife may contract for the loan of money by one to the other: *Logan v. Hall*, 19 Iowa, 491; *Jones v. Jones*, 19 Iowa, 236; *Wright v. Wright*, 16 Iowa, 496; *Blake v. Blake*, 7 Iowa, 46; *In re Alexander*, 37 Iowa, 454; *Doyle v. McGuire*, 38 Iowa, 410; *Gilbert v. Glenny*, 75 Iowa, 513; *Payne v. Wilson*, 76 Iowa, 377. And the wife is liable on the promissory note of her husband, signed by her, although she signed it and the mortgage which secured it merely to release her right of dower in the mortgaged premises: *Wood v. Dunham*, 105 Iowa, 701. In *Carse v. Reticker*, 95 Iowa, 25, 58 Am. St. Rep. 421, this court sustained a contract by which a husband agreed to let his wife have all the profits which should accrue from boarding prisoners in his charge as sheriff: See *Hoag v. Martin*, 80 Iowa, 714; *Nuding v. Urich*, 169 Pa. St. 289. A husband or wife may constitute the other an agent to control and dispose of property for their mutual benefit: Code 1873, sec. 2210; *Johnson v. Grimminger*, 83 Iowa, 10; *Taylor v. Wanda*, 55 N. J. Eq. 491, 62 Am. St. Rep. 818; *Third Nat. Bank v. Guenther*, 123 N. Y. 568, 20 Am. St. Rep. 780. And it has been held in several states, although disputed in others, that husband and wife may carry on business together as partners: *Louisville etc. R. R. Co. v. Alexander* (Ky.), 27 S. W. Rep. 981; *Belser v. Tusculum Banking Co.*, 105 Ala. 514; *Lane v. Bishop*, 65 Vt. 577; *Burney v. Savannah Grocery Co.*, 98 Ga. 711, 58 Am. St. Rep. 342. It was said in *Hanson v. Manley*, 72 Iowa, 48, that married women, under the statutes of this state, 'can hold and manage and control personal property to the same extent as though single. They can contract with reference to it, even with their husbands, and maintain actions in their own names for the enforcement of their contracts with reference thereto.' The wife may have an occupation independent of her husband, and recover for injuries which impair her power to follow that occupation: *Fleming v. Shenandoah*, 67 Iowa, 505, 56 Am. Rep. 354. It would be difficult, if not impossible, to enumerate all cases in which the husband and wife have the power to contract with each other. But, in my opinion, the code

of 1873 gave to husband and wife power to make such contracts in so many cases, involving so many different subjects, that, as a general rule, the power exists, and the cases in which it is lacking are exceptional. If that be true, it was not necessary for the petition to show that the note in suit was given for a purpose authorized by law, but if it was not given for such a purpose, the fact could have been pleaded and shown as a defense. Since husband and wife are competent to contract with each other, in my opinion it should be presumed in the first instance that their contracts are valid. Certainly, if it be true, as stated in *Stenger etc. Assn. v. Stenger*, 54 Neb. 427, that the husband, with possibly a few exceptions, is the dominant person, there should not be a presumption in his favor that his contract with his wife is void: See *Tillaux v. Tillaux*, 115 Cal. 663. It is the rule in Nebraska that 'when a married woman sets up her coverture to avoid liability on her contracts, she must in her answer negative all causes from which otherwise her liability may be inferred. . . . The reason is that her nonliability can only arise from her inability to contract, and this she must clearly allege': *Gillespie v. Smith*, 20 Neb. 455; *Union etc. Nat. Bank v. Coffman*, 101 Iowa, 594. The case of *Christensen v. Wells*, 52 S. C. 497, is to the same effect. As the contract in suit is in writing, and signed by the defendant, a consideration is presumed: Code 1873, sec. 2113; Code, sec. 3069. And if, as I contend the power of husband and wife to contract with each other is general, and the lack of that power exceptional, the rule of the cases which hold that when an action is based upon a right or obligation which is exceptional under the common law, it is necessary for the petition to show that the action is within the exception, does not apply. Where the limitations and disabilities imposed by the common law are made exceptional by the statute, the reason for the rule ceases to exist, and the rule should not be applied. Whether a wife can have a right of action against her husband in this state, unless it be for the preservation or protection of her separate property, is a question which does not seem to me to be involved in this appeal, and I do not express any opinion in regard to it. The statement of the majority to the effect that the plaintiff has no right, because she has no remedy, so far as shown, may well be considered in connection with the well-known fact that courts are apt to find a remedy where there is a right: See *Logan v. Hall*, 19 Iowa, 491; *Owen v. Owen*, 22 Iowa, 270. It is my opinion that the petition stated a cause of action, that the demurrer was properly overruled, and that the judgment of the district court should be affirmed."

A HUSBAND AND WIFE CANNOT CONTRACT WITH EACH OTHER by the common law: *Hendricks v. Isaacs*, 117 N. Y. 411, 15 Am. St. Rep. 524; and in some of the states a married woman is not authorized to make contracts with her husband: See monographic note to *Kantrowitz v. Prather*, 99 Am. Dec. 599, on the power of married women to contract under American statutes; *Hendricks*

v. Isaacs, 117 N. Y. 411, 15 Am. St. Rep. 524; note to Beach v. Beach, 38 Am. Dec. 588. In other states, however, all contracts between husband and wife are valid, with certain exceptions: Note to Kantrowitz v. Prather, 99 Am. Dec. 599.

A WIFE MAY SUE HER HUSBAND in ejectment to recover possession of her separate estate: Crater v. Crater, 118 Ind. 521, 10 Am. St. Rep. 161; and in Nebraska she may maintain an action against her husband on a note given directly to her by him for a valuable consideration during coverture: May v. May, 9 Neb. 16, 31 Am. Rep. 399. In California, no limitation exists as to the character of actions which may be maintained by a wife, when they concern her separate property or are against her husband: Wilson v. Wilson, 36 Cal. 447, 95 Am. Dec. 194. As to suits by a wife against her husband, the court, in Michigan, has gone no further than to support the wife, under the married woman's act in protecting her in the management and control of her property: Banfield v. Banfield, 117 Mich. 80, 83, 72 Am. St. Rep. 550, 551. See the monographic note to Frankel v. Frankel, 73 Am. St. Rep. 268-281, on the question when suits may be maintained between husband and wife.

CONRY v. BENEDICT.

[106 IOWA, 664.]

FRAUD—TRANSACTION BETWEEN RELATIVES—PRESUMPTION—PROOF.—When a transaction between relatives is attacked by one of the grantor's creditors as fraudulent, fraud will not be imputed to the parties because of the relationship alone, but the plaintiff must establish it, or prove a state of facts from which fraud may be inferred.

FRAUDULENT CONVEYANCE BETWEEN RELATIVES—INSUFFICIENT EVIDENCE OF.—Land conveyed to a father in law by his son in law, who held the title, though the deed was executed pending litigation with a third person and during the trial of the cause, cannot be subjected to the payment of a judgment against the grantor, on the ground that the conveyance was fraudulent, where it appears that the sale had long been contemplated; that the purchase was made for a son of the grantee; that the grantor intended to leave the state; that an adequate consideration was paid; that the father in law had originally bought the land and allowed the title to be taken in the name of his son in law, but that the latter had never paid anything on the purchase price; and that it was uncertain whether a judgment in the suit mentioned would ever be recovered against the grantor.

Suit to subject land to the satisfaction of a judgment. The plaintiff appealed from a decree for the defendants, Benedict and Bowers.

B. I. Salinger and C. S. Macomber, for the appellant.

Warren & Johnston, for the appellees.

*** LADD, J. The plaintiff recovered judgment against John A. Bowers for the sum of three hundred and nine dollars and five cents damages and one thousand and twenty-four dollars and fifty-five cents costs on the twenty-third day of April, 1895, on which execution was afterward issued and returned nulla bona. While the action in which this judgment was entered was pending, March 23, 1895, Bowers conveyed to Ed. Benedict the south one-half of the southeast one-fourth of section 28, township 87 north, of range 39 west of the fifth principal meridian, and certain personal property. This suit is brought to subject said land to the satisfaction of the judgment. When conveyed the east forty acres was occupied by Bowers as a homestead, and appellant concedes as to that forty he is entitled to no relief. He insists, however, that the west forty was conveyed for the purpose of defeating the collection of any judgment Conry might obtain. It appears that Bowers began the action, and that judgment was entered in favor of Conry on a counterclaim, and that the trial was in progress at the time the deed was executed. Benedict took an active part in the trial by way of assisting Bowers, who was his son in law, but did so, as he claims, at the request of Bowers' attorneys. The price paid for the land (forty dollars per acre) was adequate. At the same time a bill of sale of personal property was made for the consideration of three hundred and seventy-five dollars. The price was not lumped as contended, but was fixed by Bowers and the son of Benedict, for whom he was purchasing. This land had been bought by Benedict in 1887, and taken in the name of Bowers, who never paid anything on the purchase price. The consideration—two thousand dollars—was paid by assuming an existing mortgage of one thousand dollars, executing notes for six hundred and fifty dollars, and a cash payment of three hundred and fifty dollars given by Benedict to his daughter at the time of her marriage. The notes were subsequently *** discounted, and Bowers gave his note in lieu thereof, covering the six hundred and thirty dollars paid, and this Benedict also gave his daughter. These sums amounted to nineteen hundred and thirteen dollars at the time of the sale and were paid Mrs. Bowers. Benedict took up the mortgage, and this, with other loans, made up the twelve hundred and forty-six dollars, which he retained out of the purchase price of the farm. One hundred and seventy dollars was paid in cash and two hundred and forty-six dollars paid to other creditors of Bowers. This was all Bowers' property except a judg-

ment in Illinois. Some time after the sale Benedict aided Bowers in collecting that, in a way to avoid garnishment proceedings by Conry. It must be added that during this time Benedict made sworn returns to the assessor that he had no moneys and credits. His testimony of Bowers' indebtedness to him is in no other manner contradicted or impeached, and we cannot say that it should be rejected because of the general statements to the assessor. He may have considered it of no value. And again, it is a well known fact, much to be regretted, that many citizens, in other respects worthy of entire confidence, either conceal or fail to disclose personal property, in order to avoid their just contribution to the support of the government. The general assembly might find it meet that property so withheld from the burden of taxation should be deprived of protection in litigation. In the absence of such legislation, however, this will only be considered a circumstance to aid the court in passing upon the particular issue presented. We are inclined to the conclusion that Bowers owed Benedict the amount claimed. It is said that the conveyance of all tangible property by Bowers is a badge of fraud. This is fully explained, however, by his purpose to move to Missouri, and the necessity of making payment to those who invested money in the property. While the courts will carefully scan and scrutinize the dealings between close relatives, yet the mere fact that the parties to a transaction are relatives will ^{not} not relieve him alleging fraud from establishing it or proving a state of facts from which fraud may be inferred. In other words, where a transaction between relatives is attacked on the ground of fraud, it will not be imputed to them because of the relationship alone: *Allen v. Kirk*, 81 Iowa, 658; *Fifield v. Gaston*, 12 Iowa, 218.

The only suspicious circumstance in the transaction is the purchase during the trial. This is met, however, by proof that the sale had been contemplated long prior to that time; that it was made for a son of Benedict; that Bowers was intending to leave the state; that an adequate consideration was paid; and that Bowers had never invested a cent in the property. Besides, at that time it did not appear with any degree of certainty that Conry would ever recover judgment. Benedict purchased under an agreement, made long before it was known that Conry would obtain judgment, that Benedict should take the land at forty dollars per acre, unless Bowers could obtain in the meantime a higher price. While some of the circumstances are sus-

picious, all are consistent with an honest motive on the part of all parties to the transaction. We are content with the conclusion of the district court and its decree is affirmed.

FRAUDULENT CONVEYANCES.—THE MERE FACT OF RELATIONSHIP between the parties to a transfer cannot be resorted to as a badge of fraud where the conduct of the party receiving the transfer is consistent with fairness and honesty; otherwise it may be considered a badge of fraud: Note to *Butler v. Thompson*, 72 Am. St. Rep. 848. Relationship of parties to a transaction is not of itself sufficient to raise a presumption of fraud: Note to *Hanson v. Bean*, 38 Am. St. Rep. 519; *Hempstead v. Johnston*, 18 Ark. 123, 65 Am. Dec. 458; note to *Driggs etc. Bank v. Norwood*, 7 Am. St. Rep. 83.

FRAUDULENT CONVEYANCES—EVIDENCE.—FRAUD is never presumed, but must be proved: Note to *State v. Mason*, 34 Am. St. Rep. 402; *Hempstead v. Johnston*, 18 Ark. 123, 65 Am. Dec. 458; and the burden is upon him who alleges it: *Mitchell v. Deeds*, 49 Ill. 416, 95 Am. Dec. 621. He must clearly and distinctly prove it so as to satisfy the ordinary mind and conscience of its existence as a fact: *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419, 62 Am. St. Rep. 47. Evidence which merely excites suspicion that fraud may have existed is not sufficient. It must reasonably justify the inference of fraud: *Taylor v. Wands*, 55 N. J. Eq. 491, 62 Am. St. Rep. 818; *Tuteur v. Chase*, 66 Miss. 476, 14 Am. St. Rep. 577. A sale which appears doubtful or suspicious cannot be set aside as fraudulent in fact, unless such fact be established: *White v. Trotter*, 14 Smedes & M. 80, 53 Am. Dec. 112. A conveyance pending an action to defeat a judgment which may be rendered against the grantor is fraudulent and void as to his creditors: *Helms v. Green*, 105 N. C. 251, 18 Am. St. Rep. 893; *Rogers v. Evans*, 3 Ind. 574, 56 Am. Dec. 587. It is a badge of fraud for an insolvent debtor to sell his property pending a suit against him: Note to *Butler v. Thompson*, 72 Am. St. Rep. 848.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

SHERMAN v. MULLOY.

[174 MASSACHUSETTS, 41.]

GUARANTY—WHETHER A CONTINUING ONE.—A written instrument reciting that the signer agrees “to be holden for stock delivered to A to the amount of two hundred dollars (\$200), and agrees to pay the same,” is not a continuing guaranty, but ceased to be binding as soon as A had been furnished goods to the amount of two hundred dollars and had received pay therefor.

GUARANTY—CONSTRUCTION.—In cases of guaranty the language of the instrument is not to be construed most strongly against the party who uses it.

A. P. Worlhen, for the defendant.

F. W. Adams, for the plaintiffs.

⁴¹ **KNOWLTON, J.** On May 24, 1897, the plaintiffs were dealers in building material, doing business under the name of the Roxbury Planing and Moulding Company. One Coffin, a contractor and builder, with whom they had had some previous dealings, applied to them for stock or material to be used in his business. They refused to deliver it to him upon credit unless he furnished them with satisfactory security. He went away and subsequently returned, on the same day, and gave them as security a paper signed by the defendant, as follows: “Boston, May 24, 1897. Rox. Plng. & Mldg. Co., Dear Sir: I, the undersigned, agree to be holden for stock delivered to A. E. Coffin to the amount of two hundred dollars (\$200), and agree to pay the same. James Mulloy.” Thereupon the plaintiffs furnished him with goods from time to time up to November 15th of the

same year, amounting to about nine hundred dollars, and received ⁴² payment on account of the sales, such that at the date of the writ there remained due them a balance of two hundred and seventy-one dollars. At the time of signing the guaranty the defendant was indebted to Coffin to an amount exceeding two hundred dollars, and about August 21, 1897, Coffin having exhibited receipts of the plaintiffs which showed payments to them of sums amounting to more than two hundred dollars for goods sold after the delivery of the guaranty, he paid Coffin what he owed him. The only question in the case is whether the instrument was a continuing guaranty, or whether it ceased to be binding as soon as the plaintiffs had furnished Coffin goods to the amount of two hundred dollars and had received pay therefor.

The answer to the question depends upon the meaning of the instrument according to ordinary rules of interpretation. Does the paper indicate an intention on the part of the defendant that the plaintiffs should sell goods to Coffin from time to time until notified to stop, receiving payments that might be made, and that the defendant should be liable for the balance to an amount not exceeding two hundred dollars, or does it indicate merely an intention to authorize a sale of goods to an amount not exceeding two hundred dollars in all, with the guaranty as security? The language of the guaranty is such that its meaning is not clear. It seems to us the more natural construction to decide that the defendant agrees to be holden and agrees to pay "for stock delivered to A. E. Coffin to the amount of two hundred dollars," rather than that he agrees to pay not exceeding two hundred dollars on any balance that may remain unpaid after the delivery to Coffin of stock to a larger amount. Certainly, there are no words which plainly look to future deliveries to an unlimited amount. The circumstances were such as to be consistent with a purpose on the part of the parties to establish a general line of credit for future transactions for an indefinite period. But they are equally consistent with a purpose to buy goods at one time to the amount of two hundred dollars. In applying the writing to existing facts, the defendant cannot be charged with anything more than appears from the general relations of the parties of which he may be presumed to have had knowledge, namely, that the plaintiffs were dealers in building material and Coffin was a contractor and builder.

⁴³ In cases of this kind the language of the instrument is not to be construed most strongly against the party who uses it.

We are to find the meaning of the parties if possible from the language, and in doubtful cases, inasmuch as the promise is to pay the debt of another, the presumption is that a guaranty of a single transaction or of limited transactions was intended, rather than a continuing guaranty: *Cremer v. Higginson*, 1 Mason, 323, 336; *Morgan v. Boyer*, 39 Ohio St. 324, 48 Am. Rep. 454; *Melville v. Hayden*, 3 Barn. & Ald. 593, 595. We are of opinion that the instrument is not a continuing guaranty: See *Cutler v. Ballou*, 136 Mass. 337, 49 Am. Rep. 35; *Boston etc. Glass Co. v. Moore*, 119 Mass. 435; *White v. Reed*, 15 Conn. 457.

Exceptions sustained.

GUARANTY—CONSTRUCTION.—Although a guarantor is entitled to stand upon the strict terms of his contract, it must be construed by the same rules which are applied in the construction of other contracts: *London etc. Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64.

GUARANTY, WHETHER CONTINUING.—A written guaranty for the prompt payment of the price of goods purchased, or to be thereafter purchased to the amount of a certain sum named, is a collateral continuing guaranty: *Taussig v. Reid*, 145 Ill. 438, 36 Am. St. Rep. 504; but an instrument reciting that the defendant agrees to "guarantee the sum of five hundred dollars value in glass shades purchased by A from B, and if not paid within ninety days, draft to be drawn on me for the amount," is not a continuing guaranty: *Note to Columbus Sewer-Pipe Co. v. Ganser*, 55 Am. Rep. 702.

BARNES v. RYAN.

[174 MASSACHUSETTS, 117.]

RES JUDICATA—BASTARDY PROCEEDINGS.—The discharge of a man by a police court, after a hearing on a complaint for bastardy is not a bar to a subsequent complaint against him in the same court for the same offense.

J. H. Sisk, for the respondent.

R. W. Gloag, for the complainant.

¹¹⁷ **LATHROP, J.** The question in this case is whether a man, who has been discharged by a police court after a hearing on a complaint for bastardy, can set up this discharge as a bar to a subsequent complaint for the same offense.

Both complaints were made to the police court of Lynn, under the Public Statutes, chapter 85, section 1, as amended by

the Statutes of 1885, chapter 289, and the Statutes of 1891, chapter 367. The amendments do not, however, affect the case.

An examination of the provisions of the Public Statutes, chapter 85, shows that the jurisdiction of an inferior court in bastardy cases is a very limited one. By section 1, it may issue a warrant against the person accused. By section 4, a person arrested upon such a warrant may be released upon giving a bond with sureties, for his appearance in court for a time specified. By section 6, the court may continue from time to time the hearing of the complaint, and may take a bond from the accused for his appearance at any continuance, and, as amended by the Statutes of 1891, chapter 367, may order him to be committed until such bond is given. By section 7, if the accused does not appear, his default shall be recorded; and the bond, with a copy of the complaint and warrant, and a copy of the record of the court, is to be transmitted to the superior court in the same county, where the complaint is entered and proceeded ¹¹⁸ with. And if the accused is adjudged by the court, on a final hearing of the complaint, "to be the father of the child of which he is accused," the bond shall be security for the performance by him of any order of the court under section 15. A reference to section 15 shows that the word "court," as used in the last sentence, refers to the superior court.

Section 9 is the most important section relating to the question before us. "The court or trial justice before whom the warrant is returnable may, after due hearing, require the accused to give bond with sufficient sureties to appear and answer to the complaint at the next term of the superior court holden for the transaction of civil business, and abide the order of court thereon; and may order him to be committed until such bond is given."

By section 15, the issue to the jury is whether the defendant is guilty or not guilty; and if the jury find him guilty, or if he is defaulted, he shall be adjudged by the court to be the father of such child, and shall stand charged with the maintenance thereof, with the assistance of the mother, in such manner as the court shall order. The section also contains provisions as to bonds. Section 22 provides: "Prosecutions under this chapter, except as herein otherwise expressly provided, shall be according to the course of proceedings in civil cases." This section was first enacted in 1851: Stats. 1851, c. 96, sec. 1; Gen. Stats., c. 72, sec. 13.

This review of the provisions of the chapter shows that the proceedings in an inferior court are preliminary in their nature, and that such a court has no final jurisdiction in the matter. While nothing is said in the statute as to the right of the court to discharge the accused, this is naturally to be understood, where the evidence is insufficient to show probable cause to hold him. But no power is given the court to acquit him, or to render judgment in his favor which could be pleaded as *res adjudicata*. The court has no power to try the accused, but only to give him a hearing, and then to bind him over or to discharge him. In *Jennings v. Browne*, 167 Mass. 543, it was held that the statute gives no right of appeal to the complainant, in case the respondent is discharged.

While no further proceedings can be had on the original complaint after the accused is discharged, and while there is nothing ¹¹⁹ in the statute which expressly authorizes a second complaint, yet there is nothing in the statute to the contrary, and the nature of the proceedings in the inferior court is such that we are of opinion that a new complaint may be made when the accused is discharged for want of sufficient evidence to hold him.

The question has not been presented in this commonwealth, but it has been much considered in other states of this country, and in England, under statutes similar to our own; and, so far as we know, the decisions are in accordance with the views above expressed.

The leading case is *The Queen v. Machen*, 14 Q. B. 74, under the statute of 7 & 8 Victoria, chapter 101. Of this statute it was said by Lord Chief Justice Denman: "It authorizes the justices in petty sessions, upon certain evidence, to adjudge the party summoned to be the putative father, and to order him to pay money, and gives him a right of appeal; but it contains no direction as to what is to be done if the case is not made out to their satisfaction. . . . We cannot, therefore, see that the legislature intended them to have any power to adjudicate finally against the mother. Their dismissal of the application is rather in the nature of a nonsuit in an action; in which case the plaintiff may come again better prepared." Stress was laid also on the fact that the mother had no right of appeal. A writ of mandamus was accordingly issued to the inferior tribunal, directing it to hear a second application. This case was followed in *The Queen v. Gaunt*, L. R. 2 Q. B. 466. The English

statute provides that an application shall be made within one year from the birth of the child, and in cases where the second application was not made within that time, it has been dismissed for that reason, though the general doctrine has been recognized as still in force: *Regina v. Thomas*, 8 L. T., N. S., 460; *Staples v. Staples*, 41 L. T., N. S., 347; *The Queen v. Robinson*, [1898] 1 Q. B. 734.

The principal cases in this country are *Marston v. Jenness*, 11 N. H. 156; *Davis v. State*, 6 Blackf. 494; *Nicholson v. State*, 72 Ala. 176; *In re Parker*, 44 Kan. 279. All these accord with our views.

We have not been unmindful of the argument that a man should not be subjected to two complaints on the same matter. But even in a criminal case this may be done, where the court¹²⁰ discharges a man for want of probable cause to hold him: *Commonwealth v. Sullivan*, 156 Mass. 487. In such a case there is no acquittal on the first complaint. In proceedings under the bastardy act, we are of opinion, for the reasons already given, that the discharge on the first complaint cannot be pleaded as *res adjudicata*. In *The Queen v. Machen*, 14 Q. B. 74, it is said by Lord Chief Justice Denman: "We are far from saying that the dismissal is to have no weight; but we think that the justices cannot refuse to hear the second application. If it should appear to them that the matter was fully inquired into on the first occasion, they will reasonably view any new evidence with much suspicion, and sift it accordingly; but we do not think that the dismissal can operate as a bar to further inquiry."

As we find no error in the overruling by the superior court of the respondent's motion to dismiss the complaint on account of his discharge on the first complaint, the order must be, exceptions overruled.

RES JUDICATA.—For numerous applications of the doctrine of *res judicata*, see the extended notes to *Gould v. Sternburg*, 15 Am. St. Rep. 142-144; *Hawk v. Evans*, 14 Am. St. Rep. 250-252; *Gayer v. Parker*, 8 Am. St. Rep. 229-231.

BROWN v. BROWN.

[174 MASSACHUSETTS, 197.]

APPEAL—DECISIONS ON QUESTIONS OF FACT—WHEN NOT REVERSED.—When a probate appeal is taken upon the evidence alone, the decision of the probate judge on questions of fact will not be reversed unless it clearly appears to be erroneous, and if the decree is warranted by any reasonable view of the evidence it is to stand.

HUSBAND AND WIFE—GIFT TO WIFE.—In Massachusetts a married woman cannot acquire property by a direct gift from her husband, but a valid and irrevocable gift may be made from the husband to the wife through a third party.

HUSBAND AND WIFE—AGENCY—TITLE OF WIFE TO DEPOSITS IN BANK.—Where a wife, acting as the agent of her husband, receives money from him, delivers it to a bank, and directs the bank to make a contract with the wife to deliver a like amount to her, and the bank, taking the money from her as the agent of her husband, and in compliance with the directions of such agent, delivers to the wife, acting in her individual capacity, the bank-book made out in her name, the bank has made a contract with the wife, and her title to the account is good.

J. E. Abbott, for the appellant.

F. Ranney and S. D. Elmore, for the appellee.

¹⁰⁶ **HAMMOND, J.** This is an appeal from a decree of a single justice disallowing certain credits in the probate account of the appellant as administrator of his wife's estate.

There is no report of findings of fact or of rulings of law, but the case is before us upon the evidence, wholly oral, which was taken at the hearing. In such cases it is settled that the decision of the single justice on questions of fact will not be reversed unless it clearly appears to be erroneous, and, as it is not to be assumed that his rulings of law are erroneous, it follows that if the decree is warranted by any reasonable view of the evidence it is to stand: *Montgomery v. Pickering*, 116 Mass. 227; *Slack v. Slack*, 123 Mass. 443.

The items in dispute are four, namely, a deposit in the Suffolk Savings Bank, a deposit in the Provident Institution for Savings, a note of Alexander Williams, Jr., & Co., and two United States bonds; and the only question is whether the property represented by these items was the property of the wife at the time of her decease.

We think the evidence would warrant a finding of facts as follows: The appellant and intestate were married in 1871, came to Boston shortly afterward, and lived here until she died

in April, 1895. At the time of her marriage she had a daughter by her former husband from whom she had been divorced. The appellant and his wife were of frugal habits, and he managed to save a considerable part of his earnings. His habit was to share these savings with his wife, keeping one-half for himself, and providing the other half should go to her as her own money, to do with as she saw fit, his intention being to convey it absolutely to his wife. The case raises the question whether this intention was so far carried out as to make the title of the wife complete during coverture.

Although in this commonwealth there has been much change ¹⁸⁹⁰ in the law regarding the relations of husband and wife and the power of a married woman to acquire property and make contracts, yet it is still the law here that, with certain exceptions as to wearing apparel and similar articles not material to this case, a married woman cannot acquire property by gift from her husband, though such a gift may be so far valid as to give the wife a right to the property at the death of her husband as against his heirs or executors but not against his creditors. Property thus given remains the property of the husband during his life, and may be demanded by him or attached by his creditors: Pub. Stats., c. 147, sec. 3; *Spelman v. Aldrich*, 126 Mass. 113; *Thomson v. O'Sullivan*, 6 Allen, 303; *Marshall v. Jaquith*, 134 Mass. 138; *Stimpson v. Achorn*, 158 Mass. 342.

But this rule of law is applicable only in the case of direct gifts, and does not prevent the transfer of property from the husband to the wife through a third person. Perhaps the most familiar illustration is where a conveyance of real estate is made by the husband to a third person and by him to the wife. Such a conveyance passes to the wife a valid and complete title to the land, although the sole purpose of the transaction is thus to pass the title, and there is no consideration moving from or to either of the parties, and the third party is a mere conduit for the passing of the title: *Motte v. Alger*, 15 Gray, 322. A husband may give and deliver personal property to a third person, who may straightway give and deliver the property to the wife; and this would be a valid transfer of the property from husband to wife, although the sole purpose of all parties was to make such transfer. But the gift cannot be made directly. There must be some contract between the husband and a third party, and between the third party and the wife, and the title of the wife must come by contract with that third

party. If it appears that the title comes to her by such a contract, then it is good, if not fraudulent as to creditors, although the only consideration for the contract moves from the husband: *Sweeney v. Boston Five Cents Sav. Bank*, 116 Mass. 384; *Porter v. Wakefield*, 146 Mass. 25, 27. But if the contract be made with the husband in the shape of a promissory note or a check, even if payable to the wife, and this instrument is given by the husband to the wife directly, then the gift is not good: *Spelman v. Aldrich*, 126 Mass. 113.

²⁰⁰ It becomes, therefore, necessary to inquire whether whatever title the wife had to this property came to her by a direct gift from her husband or by a contract with some third party. If by a direct gift from the husband, then no irrevocable title passed, and, as she did not survive him, he took it at her death. If, however, the title came by some contract with a third person, then, if it was the intention of all parties that the title should pass to her through the latter as a conduit, there is no principle of law which would prevent it from so passing, although the consideration moved entirely from the husband, and the contract with the third party was in accordance with the original agreement between him and the husband that it should be made, and all was one entire transaction.

We think that upon the evidence in the case a finding may be made either way on this question. But we are not to assume that the justice made any erroneous ruling of law, and if the evidence justified any finding which will support the decision, then the decision must be sustained.

As to the deposits in the savings banks we think the evidence would justify the finding of the following facts: The husband desired that one-half of his earnings should go to his wife to be her own property, and he intended so to transact matters as legally to carry out that intention. And in pursuance of that intention he and his wife each had a bank-book for the same amount. The wife carried the most of the money to the bank. Her own bank-book was sometimes in her possession and sometimes in his, but when in his possession was kept by him for her and as her agent. The money deposited in the savings banks by the wife was placed in her hands by her husband, with the understanding that it should be so deposited as to be hers, and that the business should be so done as legally to carry out that intent. She carried the money to the banks under those instructions. She had the deposits made in her name,

and it may be assumed that when she obtained a bank-book she signed the register at the bank; but whether she did so or not, the delivery of the bank-book to her was the evidence of the contract between her and the bank, which was in substance to hold a sum of money for her and to be answerable to her for it. She thereafterward, with the full knowledge and consent of ²⁰¹ her husband and in accordance with his original intention, claimed this money as hers and treated it as such, and they both supposed it was hers.

If the wife, as the agent of her husband, received this money from his hands, and as his agent delivered it while still his to the bank, and, still acting as his agent, directed the bank upon receiving the money to make a contract with the wife to deliver a like amount to her, and the bank, taking the money from her as the agent of her husband, did, in compliance with the directions given by her as such agent thereupon deliver to the wife, acting in her individual capacity, the bank-book made out in her name, then the bank has made a contract with the wife, and her title to the account is good. She gets a title not by gift from the husband but by contract with the bank, and the account is hers. And we are of opinion that the evidence would warrant a finding that in making the deposits she did thus act as his agent, and that in receiving the bank-book she did thus act in her individual capacity, and in this way the real intentions of both husband and wife are carried out according to law. Her agency for her husband continued up to the time the title to the money passed to the bank, and then the bank makes the contract with her as an individual.

In this aspect of the case it is distinguishable from *Spelman v. Aldrich*, 126 Mass. 113, and similar cases, where the gift from the husband to the wife is direct and before the deposit is made in the bank.

Of course, if the gift is directly to the wife, she acquires no title no matter what she may afterward do with the property.

And the same principle applies to the *Williams* note. In the settlement with Chamberlain and Company the husband received eight thousand dollars. The settlement was made by giving to him a check for four thousand dollars payable to him, and one for four thousand dollars payable to his wife. These two checks were deposited in the Boston Safe Deposit and Trust Company on two accounts, one to the account of his wife and one to his own account. These checks were received in accord and satisfaction of the claim of the husband, and the check to

the wife became hers upon delivery to her. We think the evidence would warrant a finding that the business was conducted in that way. When she subsequently ²⁰² drew out the money and lent it to Williams, it still remained hers.

As to the bonds the court may have found that they were purchased by the money of the wife.

The exception to the exclusion of the evidence was waived at the argument.

Decree affirmed.

ON APPEAL, FINDINGS OF FACT made by the trial court will not be disturbed if there is evidence to justify them; such findings have the force and effect of a verdict of the jury: *Note to Hunter v. Clark*, ante, p. 163.

A GIFT BY A HUSBAND directly to his wife will in many cases be upheld in equity: *Botts v. Gooch*, 97 Mo. 88, 10 Am. St. Rep. 286. See, further, on this question the extended notes to *Wilder v. Brooks*, 88 Am. Dec. 54-56; *Williamson v. Yager*, 34 Am. St. Rep. 212.

VAN CAMP HARDWARE AND IRON CO. v. PLIMPTON.

[174 MASSACHUSETTS, 208.]

ATTACHMENT—TRUSTEE PROCESS—GOODS LOADED FOR SHIPMENT.—If the freight and the expense of unloading the goods and of the delay occasioned to a carrier as trustee, who has been served with process, would have amounted to as much or more than the value of the goods, the trustee is not required to unload the goods so that they may be taken on execution, and he is entitled to be discharged.

ATTACHMENT — TRUSTEE PROCESS — RETURNING GOODS CARRIED TO DISTANT PORT.—When goods of the defendant have been laden on board ship by an alleged trustee, for carriage to a distant port, and the expense and delay attending the unloading of them will be as much as they are worth, the trustee cannot be required at his own risk to transport them to their destination, and then to return them to the port of shipment in order that they may there be taken on execution if the plaintiff recovers judgment against the defendant.

L. M. Friedman, for the plaintiff.

L. S. Dabney and F. Cunningham, for the trustee.

²⁰⁸ **MORTON, J.** The defendants are described in the writ as of Liverpool, England, and as doing business under the name of J. C. Plimpton & Co. The plaintiff is an Illinois corporation. Suit was brought here by a trustee process in which Frederick Leyland & Co., a corporation established under the

laws of Great Britain, was summoned as trustee of the defendants. The trustee answered, and after a hearing upon the answer the superior court ordered that the trustee be discharged. The plaintiff appealed from that order, and the sole question before us is whether at the time of the service of the writ upon it on May 3, 1898, the trustee had in its hands or possession any goods, effects, or credits of the defendants.

It appears from the trustee's answer that it owns and runs a line of steamships between Boston and Liverpool, and is engaged ²⁰⁰ in the transportation of freight between those two cities. On April 29, 1898, it received from the Boston and Albany Railroad under through bills of lading to J. C. Plimpton & Co., Liverpool, a carload of lawn mowers in cases marked J. C. P. & Co. On April 29th and 30th these cases were laden on board the steamship "Cestrian" belonging to the trustee, which was taking in a cargo for Liverpool. The cases were stowed "in different places in the different hatches, holds, and decks to fill up small spaces by what is commonly known as broken stowage, and had been so laden and stowed in different places and among and underneath other cargo" before the writ was served on the trustee. In order to unload the lawn mowers it would have been necessary to unload substantially all of the ship's cargo, except the grain and provisions, and would have cost at least two thousand dollars, and would have delayed the ship at least three days. Provisions and other perishable cargo had been laden on board the steamship before the service of the writ, and cattle were on the wharf ready to be laden on board, which would have suffered great damage by any delay in sailing and the expense of feeding, which would have been at least five hundred dollars per day. The expense of unloading, and the loss which the trustee would have suffered by the delay, would have amounted to more than the value of the lawn mowers. The trustee also alleges, if that is material, that the plaintiff had knowledge of the whereabouts of the lawn mowers before they were laden upon the steamship, and an opportunity to attach them if they were the property of the defendants.

We think that the action of the superior court in discharging the trustee was right. We assume in favor of the plaintiff that the mere fact that the goods were in transit would not of itself entitle the trustee to be discharged: *Adams v. Scott*, 104 Mass. 164. We also assume in its favor that when the goods were put on board the steamship the title to them was in the defendants,

and that the goods are to be regarded as intrusted to or deposited in the hands or possession of the trustee within the meaning of the statute. But it does not follow that the trustee should be charged.

The object of the trustee process is to enable a creditor to attach goods or credits of his debtor in the hands of a third person. ²¹⁰ When goods are attached the trustee is required to hold them till judgment is obtained or the action is otherwise disposed of in order that they may be taken on execution if the plaintiff obtains judgment against the defendant. But it is well settled that the trustee is not to be put in any worse position pecuniarily by reason of the attachment than he would otherwise have occupied in respect to the goods or credits attached: *Boston Type Co. v. Mortimer*, 7 Pick. 166, 168, 19 Am. Dec. 266; *Smith v. Stearns*, 19 Pick. 20, 22; *Waldron v. Wilcox*, 13 R. I. 518; *Drake on Attachment*, 2d ed., sec. 462.

If, for instance, he has advanced on goods of the defendant in his possession their full value or has a lien on them for their full value, he will not be charged as trustee and will not be obliged to deliver up the goods to be taken on execution: *Burlingame v. Bell*, 16 Mass. 318, 324; *Grant v. Shaw*, 16 Mass. 341, 344, 8 Am. Dec. 142; *Curtis v. Norris*, 8 Pick. 280.

Or if, before final answer, the defendant becomes indebted to him on a contract entered into before the service of the writ, he will be chargeable only with the final balance, if any, that may be due: *Lannan v. Walter*, 149 Mass. 14. We regard this case as analogous to those. The defendant could not have compelled the trustee to unload the goods without tendering full indemnity for the expense to which it would thereby be put, and without offering to pay the freight: *M'Gaw v. Ocean Ins. Co.*, 23 Pick. 405; *Lord v. Neptune Ins. Co.*, 10 Gray, 109, 119, 120; *Violett v. Stettinius*, 5 Cranch C. C. 559; *Shipton v. Thornton*, 9 Ad. & E. 314; *Thompson v. Small*, 1 Com. B. 328; *Hutchinson on Carriers*, 2d ed., sec. 337.

The trustee's claim to be reimbursed for the expenses caused by unloading would not, perhaps, be a lien upon the goods, and would not, perhaps, constitute a setoff in the strict sense of the words against a demand for the goods by the defendant; but it would furnish a valid excuse for their nondelivery and would relieve the trustee from liability for their conversion. "The trustee," it is said in *Eddy v. O'Hara*, 132 Mass. 56, "being a mere stakeholder summoned into a suit in which he has no personal interest, is entitled to the protection of the court under

circumstances in which an ordinary defendant might be held liable." If the freight and the expense of unloading the goods²¹¹ and of the delay thereby occasioned to the trustee would have amounted to as much as or more than the value of the goods, we do not think that the trustee could be required to unload them in order that they might remain here to be taken on execution. And it follows that if the status of the goods at the time of the service of the writ upon the alleged trustee was such, either because the trustee had a lien upon them or for some other equally valid reason, that the trustee could not be required to hold them in order that they might be taken on execution, then the trustee was entitled to be discharged.

It is no answer to say that the trustee could have carried the goods to Liverpool, and brought them back. The statute contemplates that in order to charge the trustee the goods shall be in his possession and within the commonwealth at the time of the service of the writ upon him: *Andrews v. Ludlow*, 5 Pick. 28; and that they should remain here in order that they may be taken on execution. If the trustee transports them to foreign parts, he does so at his own risk. And we think that when goods of the defendant have been laden on board of a ship by an alleged trustee, in the usual course of its business for carriage to a distant port, and the expense and the delay attending the unloading of them will be as much as they are worth, the trustee cannot be required at its own risk to transport them to their destination, and then to return them to the port of shipment in order that they may there be taken on execution if the plaintiff recovers judgment against the defendant. It might be doubtful whether under such circumstances the alleged trustee would be entitled to return freight and to the expense of reloading, to say nothing of insurance and possible duties and other expenses, if any.

The plaintiff relies on *Adams v. Scott*, 104 Mass. 164, and *Landa v. Holck*, 129 Mo. 663, 50 Am. St. Rep. 459. But in neither of those cases did it appear that to unload the goods, or deliver them to the person entitled to them, would subject the alleged trustee to an expense equal to or more than the value of the goods in its possession, or would impede the transportation of other goods and cause injury to them, or that there was any right on the part of the alleged trustees to the possession of the goods for the purpose of earning freight.

²¹² We have not thought it necessary to trace the history of the statutes in this commonwealth relating to the trustee pro-

cess. For an exhaustive discussion of the process of foreign attachment as practiced in the city of London, see *Mayor etc. v. Cox*, L. R. 2 H. L. 239.

Appeal dismissed; order discharging trustee affirmed.

ATTACHMENT—GOODS IN HANDS OF CARRIER.—Property in the possession of a common carrier, awaiting shipment, is subject to garnishment at any time before its transit has commenced: *Landa v. Holck*, 129 Mo. 663, 50 Am. St. Rep. 459, and see note thereto.

HECTOR v. BOSTON ELECTRIC LIGHT COMPANY.

[174 MASSACHUSETTS, 212.]

ELECTRIC LIGHT COMPANIES—INJURY TO LINEMAN OF TELEPHONE COMPANY—LIABILITY.—In an action by a lineman of a telephone company for injuries received from contact with an uninsulated wire charged with electricity belonging to an electric light company while upon the roof of a building, it is not sufficient to show that the defendant had reasonable cause to expect that the plaintiff would go rightly or wrongly on roofs covered by its wires, but the plaintiff must show that the defendant had invited or licensed him to go where he was when he was injured.

S. L. Whipple and W. M. Noble, for the plaintiff.

E. W. Burdett and C. W. Snow, for the defendant.

212 MORTON, J. After the former decision in this case, reported in *Hector v. Boston Electric Light Co.*, 161 Mass. 558, the plaintiff amended his declaration by adding an allegation that the defendant was wrongfully maintaining its wires over 41 Temple Place, without any right or permission from the owners or occupants thereof, and went to trial on the declaration as thus amended. At the conclusion of the plaintiff's evidence, the learned chief justice of the superior court ruled that the plaintiff could not recover and directed a verdict for the defendant. The case comes here now on the plaintiff's exceptions to this ruling and order. The plaintiff contends that the evidence at the last trial differed favorably to him in material respects from what it was at the former trial, and therefore that the grounds on which the court decided that case are not applicable to this. But while it is true that there are some differences, we do not think that they affect the substantial grounds on which the decision in that case was placed. Those grounds were, in brief, that the defendant owed no duty

to the plaintiff to have its wires properly insulated at the place where he was injured, or to have them supported so far above the roof of No. 41 that the plaintiff would not come in contact with them, and that the defendant was not required, for the protection of the servants of the telephone company, to maintain an effectual insulation of its wires over other buildings than that on which the standard was placed at places where the defendant had no reason to expect that they would go in using its standard, and where the defendant had neither invited nor licensed them to go.

It was assumed in the opinion that the defendant had permitted the telephone company to use its standard on building No. 45 Temple Place, and that the plaintiff, as the servant of that company, had an implied license through the defendant from the owner or occupant to go upon the roof of No. 45 and attach telegraph and telephone wires to the standard. The fact, if it was a fact, that the right of the telephone company to attach its wires to the standard was somewhat greater than it was there assumed to be, does not affect the principle on which that case was decided. That case turned not on the nature of the right which ²¹⁴ the telephone company had to attach its wires to the standard, but on the duty, if any, which the defendant owed to the plaintiff at the place where he was injured. Neither, we think, for the same reason does it make any difference that the plaintiff was not sent to attach a wire to the standard on No. 45 Temple Place, but was sent over into Temple Place to find a suitable route and a suitable series of fixtures for the wire that was to be run; nor that he was not stooping under a group of wires when hurt; nor that the defendant, not long before the accident to the plaintiff, had acquired a joint interest with the telephone company in the fixture on building No. 34 Temple Place. The plaintiff does not contend, as we understand him, that there was any evidence tending to show that the defendant wrongfully maintained its wires over No. 41 Temple Place. The most that he contends for in that regard is that its rights were no greater than those of the telephone company to maintain its wires over the same building. He assumes, and we think rightly upon the evidence, that the telephone company and the defendant company both maintained their wires over building No. 41 by implied permission of the owners or occupants of that building; in other words, that they were licensees. This was, in substance, the situation at the former trial, though, perhaps, it was not brought out so sharply.

The matters most strongly urged as new or as not developed at the former trial consist of evidence, tending to show that there had been a joint use to a greater or less extent prior to the accident by the defendant and the telephone company of structures throughout the city, the structures sometimes belonging to one and sometimes to the other; that the telephone company had so used the standard belonging to the defendant on the building No. 45 Temple Place; that linemen in the discharge of their duties go everywhere upon roofs where there are wires, and from roof to roof as may be necessary to reach a particular fixture, though whether with or without the permission of the owners or occupants of the buildings did not appear, and that the alternating wires which were strung from the fixture on the building No. 45 Temple Place to that on No. 34 Temple Place, and from one of which the plaintiff received the shock which caused the injury, had been strung only a short time before the ²¹⁵ accident, and were amongst the telephone wires which had been there a long time. This evidence was material only as tending to show that the defendant had reasonable cause to expect that the plaintiff would approach the fixture on No. 45 at the place and in the manner in which he was approaching it when he was injured, and had invited or licensed him to go there for the purpose of attaching the telephone wire to that fixture. The evidence failed to show that. There was nothing tending to show that the defendant invited or licensed the plaintiff to go everywhere over the roofs in the city where there were wires, or that it had any authority to do so. It was not enough to show that the defendant had reasonable cause to expect that the plaintiff in the discharge of his duties would go rightly or wrongly upon roofs covered by its wires. The plaintiff was bound to go further, and show that the defendant had invited or licensed him to go where he was when he was injured. It was held in the former opinion that it was not the duty of the defendant to have its wires properly insulated over their whole circuit, or to have them placed so far above the roofs of buildings which they covered that the plaintiff and other linemen would not come in contact with them. It limited the duty and liability of the defendant to cases in which it had permitted or licensed the telephone company to use its fixtures, and to places where it had reasonable cause to expect that the servants of the telephone company would go in the discharge of their duties in connection with wires attached to the defendant's fixtures and to which it had invited or licensed

them to go. And, as applied to the evidence now before us, we see no reason to modify or change the views then expressed, and no ground on which the defendant can be held liable.

We have not considered the question of due care on the part of the plaintiff. We doubt whether a finding that he was in the exercise of due care would be warranted. The view which we have taken of the effect of the former decision renders it unnecessary, however, to consider that question.

Exceptions overruled.

ELECTRIC COMPANIES.—IMPERFECT INSULATION of electric wires acts as an invitation to persons working among them to risk the consequences of contact with them: *Perham v. Portland Electric Co.*, 33 Or. 451, 72 Am. St. Rep. 730. If electric companies fail to insulate their wires, and one lawfully on a roof engaged in work requiring him to risk coming in contact with the wires is injured, he is entitled to damages, and no presumption of contributory negligence will be indulged: *Clements v. Louisiana Electric Co.*, 44 La. Ann. 692, 32 Am. St. Rep. 348.

BOSTON INSURANCE COMPANY v. GLOBE FIRE INSURANCE COMPANY.

[174 MASSACHUSETTS, 229.]

IN MARINE INSURANCE a policy may be issued to cover property in which the insured has not at the time any interest, and the policy will attach when the interest is acquired.

MARINE INSURANCE—REINSURANCE—WAGERING POLICY.—A contract of reinsurance of such marine risks as the reinsured has when the contract was entered into, or might have or take during the year that it was to run, is not void as a wager policy, but is a valid contract of insurance.

E. P. Carver, for the plaintiff.

E. S. Mansfield and P. Mansfield, for the defendants.

²³⁰ **MORTON, J.** In each of these cases there was a demurrer, which was sustained, and judgment ordered for the defendant. The plaintiff thereupon appealed to this court. The declaration alleges in each case in substance that the defendant made a contract of reinsurance with the plaintiff for fifty thousand dollars, by which the defendant agreed that it would pay one-half of all losses that the plaintiff should suffer by fire under marine policies of insurance for one year, not exceeding five thousand dollars on any one loss; that while the contract was in

force the schooner "Marguerite" and her cargo and freight, which were insured under a marine policy in the plaintiff company, were totally destroyed by fire, and the plaintiff became liable to pay and did pay one thousand and seventy-five dollars, and the defendant became liable to the plaintiff for one-half thereof; and that due proof of loss was made to the defendant company. A copy of the policy is annexed to and made a part of the declaration in each case. From that it appears that the reinsurance was to cover "hulls, freights, cargoes, profits, and / or other insurable interests, insured under marine policies, in any part of the world, which the said Boston Marine Insurance Company has, may have, or shall take during the currency of this policy." Then follow words limiting the risk, "To cover any and all loss, and / or damage, charges, and / or expenses caused by or arising from fire," etc. The demurrer in each case is the same, and the ground of it is that the policy of reinsurance "is illegal and void, because it purports 'to cover hulls, freights, cargoes, profits, and / or other insurable interests, insured under marine policies in any part of the world,' which the plaintiff had October 19, 1897, or may have or shall take during the currency of said policy, to wit, during one year from October 19, 1897, until October 19, 1898."

The question is the same in both cases, and is whether the reinsurance of such risks as the plaintiff had when the contract was entered into, or might have or take during the year that it was to run, rendered the policy void as a wager policy.

It is to be assumed that it was within the power of the defendant to issue reinsurance policies on marine fire risks. Though the reinsurance was for losses occasioned by fire, it is evident that it was for fire as a part of a marine risk, and constituted in substance and effect marine insurance. This renders ²³¹ inapplicable the recent case of *Sun Ins. Office of London v. Merz*, 63 N. J. L. to which our attention has been called by counsel for the defendant. If the defendant undertook marine insurance it was bound by the law and the usages which apply to that kind of insurance: *Imperial Ins. Co. v. Fire Ins. Co.*, 4 C. P. Div. 166. The policy which it issued to the plaintiff was an open policy for one year, and was intended to cover not only risks which the plaintiff had taken and which were in force at the date of the policy, but was also intended to attach to and cover such marine risks as the plaintiff should thereafter take during the continuance of the policy. It is clear, we think, that in marine insurance a policy may be issued to cover prop-

erty in which the insured has not at the time any interest, but in which he subsequently acquires an interest, and that the policy will attach when the interest is acquired. Such policies are of common occurrence, and are required by the necessities of business: See *E. Carver Co. v. Manufacturers' Ins. Co.*, 6 Gray, 214; *Clark v. Higgins*, 132 Mass. 586; *Lincoln v. Boston Ins. Co.*, 159 Mass. 337; *Insurance Co. of North America v. Hibernia Ins. Co.*, 140 U. S. 565; *Arnold v. Pacific Ins. Co.*, 78 N. Y. 7; *Continental Ins. Co. v. Aetna Ins. Co.*, 138 N. Y. 16; *Beddall v. British etc. Ins. Co.*, 143 N. Y. 94.

We do not see why there may not be a valid contract of indemnity in regard to such risks by one insurance company with another which shall attach as the risks are taken by the original insurer. Such a contract or policy would constitute in no just sense a wager policy. The reinsurer would be liable under it only in cases where the reinsured had an insurable interest and suffered a loss. Contracts to take effect on the happening of a future event are not unfamiliar or contrary to law. Letters of credit and offers of reward are familiar illustrations: See, also, *Blanchard v. Cooke*, 144 Mass. 207. In ordinary insurance upon merchandise in a store belonging to the proprietor or on commission, the policy will attach to goods subsequently purchased or received, and in which at the date of the issuing of the policy the insured could have had no possible interest: *Lee v. Howard Ins. Co.*, 11 Cush. 324; *Hooper v. Hudson River Ins. Co.*, 17 N. Y. 424. See, also, *Rivaz v. Gerussi*, 6 Q. B. Div. 222; *Sawyer v. Dodge County Ins. Co.*, 37 Wis. 503; *Mills v. Farmers' Ins. Co.*, 37 Iowa, 400.

232 It is not necessary in all cases that there should be an insurable interest at the time when the policy issues in the property on which insurance is desired. In marine insurance it is sufficient if there is an insurable interest when the risk begins and at the time of the loss: *Hooper v. Robinson*, 98 U. S. 528. In such a case the policy will attach and the insurer will be liable. We see no reason why reinsurance should differ in this respect from original insurance. Any other rule would result in many cases in rendering reinsurance impossible, and we can see no advantage in such a rule, or reason for it. If the reinsurer wishes to know the particulars of the risks that are taken by his insured, he can protect himself by stipulations to that effect, as is commonly done; but the absence of such stipulations will not render the reinsurance contract invalid. It attaches

ex proprio vigore to the risks as they are assumed by the re-insured: *Imperial Ins. Co. v. Fire Ins. Co.*, 4 C. P. Div. 166, 171, 172; *Arnold v. Pacific Ins. Co.*, 78 N. Y. 7, 13.

The learning and diligence of counsel for the defendant have placed before us many extracts from text-books and cases and codes, in which the general doctrine is laid down that there must be an insurable interest at the time when the policy issues, and that there can be no reinsurance except to the extent to which the reinsured has an insurable interest subsisting at the time of reinsurance. As general propositions, we have no occasion to discuss them or to differ from them. We do not understand that it is the law in regard to marine insurance, or that it has been decided that one insurance company may not contract with another insurance company to be indemnified by the latter for a certain time and to a certain amount for losses from risks of a certain character which it has already taken, and that it may take during the life of the contract.

That was and is the question raised by the demurrer. We think that the ruling sustaining the demurrer was wrong. The result is that the demurrers must be overruled, the appeals sustained, and the judgments set aside.

So ordered.

REINSURANCE IS A CONTRACT of indemnity in which the insurer reinsures risks in another company: *Barnes v. Hekla Ins. Co.*, 56 Minn. 38, 45 Am. St. Rep. 438; it is a valid contract both as to fire and marine policies: See extended note to *Barnes v. Hekla Ins. Co.*, 45 Am. St. Rep. 442.

INSURANCE—FUTURE PROPERTY.—A policy of insurance covering grain in stacks and granary for five successive crops is valid; so, too, is a policy covering future purchases of goods: See extended note to *Strong v. Manufacturers' Ins. Co.*, 20 Am. Dec. 518.

COMMONWEALTH v. CHANCE.

[174 MASSACHUSETTS, 245.]

TRIAL—CRIMINAL—JURORS.—An objection which does not affect the whole panel of jurors is not a ground of challenge to the array.

TRIAL—CRIMINAL—VIEW OF PLACE OF CRIME.—The right of an accused person to have the jury view the place where the murder was committed rests in the discretion of the court.

WITNESSES—CONTRADICTING.—In a criminal case, the prosecution, for the purpose of contradicting a witness, may prove that he testified differently before the grand jury.

TRIAL—CRIMINAL—VOLUNTARY CONVERSATION OF ACCUSED.—Where an accused has had three conversations with

police officers, separated in time, each complete in itself, and in no way referring forward to things still to be said for explanation or qualification, the fact that they all relate to the same subject does not make them one conversation, and the third conversation may properly be excluded as not being voluntary, without the exclusion of the other two.

TRIAL—EVIDENCE—REBUTTAL.—Where, in a criminal case, the prosecution may rest on general presumptions, as that a man can run, until specific evidence is introduced tending to show that the particular case is exceptional, the fact that the prosecution knew that a defense to such presumption would be set up does not affect its duties and compel it to introduce all its evidence as part of its case in chief, but it may wait until the defense is set up and introduce evidence in rebuttal.

TRIAL—CONVERSATIONS AS PART OF RES GESTAE.—Where an act can be proved, it does not follow that any and all conversation which happens to be going on at the time of the act can be proved also.

APPEAL—ERROR IN EXCLUSION OF EVIDENCE.—It is not error to exclude an answer where it does not appear what it was expected to be, where it is presumably hearsay, and where it is not shown that anything admissible was expected.

APPEAL—INSTRUCTIONS—ERROR.—The omission from a requested instruction of the words "abiding conviction amounting to a moral certainty," as explanatory of the obligation of the government to prove its case beyond a reasonable doubt, is not error where the substance of the instruction has been given.

INSTRUCTION—CRIMINAL CASE—MALICE.—The accused in a murder case is not prejudiced by a failure to instruct the jury that "malice means intent to kill or do grievous bodily harm; if there was such precedent intent the homicide is murder; if there is no precedent intent, there is no murder," where from the instructions actually given it appears that the whole jury were led to suppose that an actual intent to kill unlawfully was necessary to the offense of murder.

HOMICIDE—WHAT MAY BE MURDER.—An accidental homicide may be murder if it occurs in the course of an attempt to commit a felony.

H. P. Harriman and G. P. Wardner, for Chance.

M. J. Sughrue, assistant district attorney, for the commonwealth.

²⁴⁷ **HOLMES, C. J.** 1. If the challenge to the array was in due form, and if an exception was taken to the decision overruling it, still, fairly construed, it does not allege on independent grounds that the law as to posting the jury list in the city of Boston was not complied with, but rather that the records set forth show that it was not, or do not show that it was: *Stata. 1897, c. 515, sec. 2.* We do not mean to give any countenance to the objection, but for the purposes of decision it is enough to say that, if it were well taken, it does not affect the whole panel, and therefore is not a ground of challenge to the array: *Commonwealth v. Walsh, 124 Mass. 32, 38.*

2. The second exception is to the refusal of the court to order a view of the place where the murder was committed and of the route along which the defendant Chance was alleged to have fled. It was expected that such a view would strengthen the argument for Chance that he was unable to run as the murderer ran. On the other hand the view was objected to by the defendant Hagan. The whole matter rested in the discretion of the court. The language of the chapter as to criminal trials is that the court "may order a view," etc.: Pub. Stats., c. 214, sec. 11. In the chapter concerning juries the language is, "The jury may . . . be taken to view the premises . . . when it appears to the court that such view is necessary to a just decision": Pub. Stats., c. 170, sec. 43. The word "may" implies a discretion. Without such governance views might become rather an obstruction than an aid to justice, and we believe that when extended from their ancient use in real actions they always have been held to be subject to the discretion of the court both in this state and in England: *Commonwealth v. Webster*, 5 Cush. 295, 298, 299, 52 Am. Dec. 711; *The Queen v. Martin*, L. R. 1 C. C. 378, 381; *Anonymous*, 6 Mod. 211; *Anonymous*, 1 Barn. 144; *Attorney General v. Green*, 1 Price, 130; 1 Burr. 252, 254, 255; *Anonymous*, 2 Chit. 422. This being so, although the view might have been evidence if it had been taken, photographs and plans found to be instructive properly were admitted.

3. A woman with whom Chance lived was called by the government, ²⁴⁸ and gave testimony tending to prove innocence by way of alibi, and of his appearance on coming home after the hour of the murder. The government then was allowed to ask her whether she had not testified before the grand jury that, Chance returned in about half an hour after his going out, which was fixed by her at about the hour of the murder, and that he was out of breath as though he had been running, white as a sheet and nervous. This was admitted to lay a foundation for contradiction under Public Statutes, chapter 169, section 22. It is objected that it violated the secrecy of proceedings before the grand jury. But this objection is disposed of by *Commonwealth v. Mead*, 12 Gray, 167, 71 Am. Dec. 741; *New Hampshire Ins. Co. v. Healey*, 151 Mass. 537, 538.

4. The defendant was arrested on April 20, 1898. On that day he had a conversation with an officer in which he gave a certain account of where he was on the night of the murder, and admitted that he owned a coat found in the alleged path of

the running murderer, and that he had it about the hour of the murder. On the morning of the next day the defendant was asked in the presence of several officers concerning his whereabouts, and gave a somewhat different account, and said that he went to bed about half-past eight or nine, whereas the testimony of the woman with whom he lived was that he was away from home after eight for a greater or less time. On the afternoon of that day the defendant was arraigned, and in the evening the same officers, with one exception, examined him at length with a stenographer. In the course of this last examination there was evidence, more or less contradicted, of certain words being used by an officer which the court found or ruled to be such an inducement as to render the portion of the examination which followed inadmissible. The court thereupon found or ruled that the previous part of the examination was so connected with the later part that none could be put in. The defendant then asked the court to go still further, and to rule that the two previous examinations were so connected with the last that they also should be excluded; but, upon the court refusing so to rule, preferred to have the whole of the third examination go in, saving his exception to the refusal to exclude all three.

We do not see what we can say by way of argument to make ~~the~~ the independence of the three conversations plainer than it is made by a simple statement of the facts. They were separated in time, and each was complete in itself and in no way referred forward to things still to be said, or depended upon them, for explanation or qualification of what had been said already. The fact that they all related to the same subjects, as they naturally would, did not make them one: *Rex v. Reason*, 1 Strange, 499, 500. The court went to the extreme in its anxiety to protect the defendant's rights. If it had gone further, it clearly would have been wrong: See *Commonwealth v. Keyes*, 11 Gray, 323, 324; *Adam v. Eames*, 107 Mass. 275; *Commonwealth v. Campbell*, 155 Mass. 537; *Commonwealth v. Russell*, 160 Mass. 8, 10.

It is argued further that the conversations were not voluntary in view of the defendant's confinement, recent recovery from a fit of delirium tremens, etc. We have no disposition to make the rule of exclusion stricter than it is under our decisions. It goes to the verge of good sense, at least: *Regina v. Baldry*, 2 Den. C. C. 430, 443, 446; *Regina v. Reeve*, 12 Cox C. C. 179, 180; *Hopt v. People*, 110 U. S. 574, 584. The finding that the conversations were voluntary was fully warranted: See *Commonwealth v. Bond*, 170 Mass. 41.

Finally, it is slightly pressed that the conversations had nothing in them tending to criminate the defendant, while it is insisted that he suffered by their being admitted. We believe that in stating the first two we have indicated sufficiently their relevancy.

5. It being important to prove whether the defendant shaved off his mustache before or after the murder, a witness was permitted to testify through an interpreter that he did not remember the time but that he had a sign—that the night before there was a fight at Kasanof's store, and the following morning the mustache was taken off. This was excepted to. Another witness then fixed the date of the fight at Kasanof's store as the date of the murder. The evidence was admissible on elementary principles: *McDonald v. Savoy*, 110 Mass. 49, 50.

6. The government put in evidence that after the murder the defendant Chance was seen running rapidly from the place. A part of the evidence for the defense was that Chance, by reason ²⁵⁰ of injuries and illness, was unable to run fast. The government knew that this defense would be set up, and experts on both sides had examined Chance beforehand. The defense was indicated further by the cross-examination of the witnesses who said that they saw Chance run. Under these circumstances, the defendant contended that the government was bound to put in all its evidence as to Chance's ability to run as part of its case in chief; but the court ruled, subject to exception, that such evidence would be proper in rebuttal, and the government evidence was put in at that stage. The ruling was right. No doubt Chance's ability to run went to the identity of the man seen running, but there are many possible questions on the elements of the case which the government must prove, concerning which it may rest on general presumptions until specific evidence is introduced tending to show that this is an exceptional case. It must show that the defendant did not do the act by reason of insanity, but it is not obliged to call experts in the first instance to show that the man was sane. Trials would be made even more unnecessarily long than they are if all possible defenses of this sort had to be met in advance without waiting to see whether they are set up. Most men can run. That was enough until the jury had some ground for believing that Chance did not fall under the general rule. Of course, the fact that the government had reason to expect the evidence which was offered in defense did not affect its duties. It had a right to wait until the expectation was fulfilled. Whether an

exception could be maintained upon this matter we need not consider, as in our opinion the court took the proper course.

7. Evidence was offered by the defense and excluded, subject to exception, that one Mrs. O'Brien, since dead, during a quarrel with her husband went to a closet took out two bullets and said, "The third one killed Russell." Seemingly, it was argued that the evidence showed grounds for suspecting Mrs. O'Brien's husband, and that her declaration was admissible under the Statutes of 1898, chapter 535. The statute was met by the judges, who were not satisfied that the declaration was made in good faith and upon personal knowledge. It now is argued that the evidence was admissible as part of the *res gestae*. But it was no part of any material fact or act. Assuming that the presence ²⁵¹ of the bullets in the closet had some infinitesimal bearing upon the case, which is going far, the fact that Mrs. O'Brien, rather than some one else, took them out was immaterial, except on the assumption that the declaration was material, which is the very thing to be proved. If her taking out the bullets were material, still the declaration would not be made admissible by that fact, but would have to stand on its own merits, which are not enough. The act of taking out the bullets needed no explanation and was not explained, in any material sense, by Mrs. O'Brien's words. It is not the law that any and all conversation which happens to be going on at the time of an act can be proved if the act can be proved.

8. A witness testified that she had seen O'Brien wearing an overcoat like the one produced which belonged to Chance and was found in what was supposed to be the path of the murderer's flight. The witness did not identify the coat or in any way fix the time when she saw O'Brien wearing one like it. She was asked what O'Brien said at the time. It does not appear what the answer was expected to be. We find it hard to imagine anything which would have been material and admissible. O'Brien was alive, so that the statute mentioned above did not apply. Presumably, what he said was mere hearsay. If it had been a confession, still the cases have held that the general rule against hearsay applies: *Commonwealth v. Chabcock*, 1 Mass. 144; *Farrell v. Weitz*, 160 Mass. 288; 6 Am. & Eng. Ency. of Law, 2d ed., 573, subv. "Confessions." If anything admissible was expected it should have been shown: *Honsuckle v. Ruffin*, 172 Mass. 420.

9. The defendant Chance seems to have presented an unreasonable number of requests for rulings. The thirty-seventh is brought before us. It was given in substance by the court,

except that the court did not use the phrase "abiding conviction amounting to a moral certainty," as explanatory of the obligation of the government to prove its case beyond a reasonable doubt. This matter has been disposed of with what but for this case would seem almost superfluous amplitude in *Commonwealth v. Costley*, 118 Mass. 1, 23-25.

10. The last exceptions argued are to the refusal to give in terms the instructions asked with regard to the definition of ²⁵² murder and malice aforethought. "Malice," it was said, "means intent to kill or do grievous bodily harm." If there was such precedent intent, the request went on, "the homicide is murder. If there is no precedent intent, there is no murder." The court went further in favor of the defendant rather than less far, although it did not use the words of the request. After defining murder in the usual way, it went on to state that malice "means the state of mind which prompts the conscious violation of law to the prejudice and injury of another." It "is intended to denote an action flowing from any wicked and corrupt motive." The court then said that homicide "may be manslaughter when done by a rash and wanton act without malice; or it may be with purpose and intent to do the unlawful act of killing accompanied by malice aforethought, and then it is murder. It is with the latter charge of murder that we have here to deal." So that on the whole the jury were led to suppose that an actual intent to kill unlawfully was necessary to the offense of murder. The defendant cannot complain. If it had been necessary, the jury properly might have been instructed that it is possible to commit murder without any actual intent to kill or to do grievous bodily harm, and that, reduced to its lowest terms, malice in murder means knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act, coupled, perhaps, with an implied negation of any excuse or justification. "The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct": 1 East P. C. 262; *Commonwealth v. Pierce*, 138 Mass. 165, 178, 52 Am. Rep. 264. Of course, we do not mean to imply that such a likelihood would be enough to satisfy the statutory requirement of deliberately premeditated malice aforethought, and to constitute murder in the first degree.

It is suggested that the instructions asked would have excluded the possibility of the jury's finding that the offense was

murder because committed in the attempt to commit an offense punishable with imprisonment for life, whereas, it is argued, the offense must be murder on other grounds, and then is raised by the supposed concomitant to murder in the first degree: Pub. Stats., c. 202, sec. 1. The applicability of this suggestion appears to ²⁵³ us wholly fanciful, but the suggestion itself is opposed to the most authoritative statements of the common law, which recognize that an accidental homicide may be made murder if it occurs in the course of an attempt to commit a felony: *Rex v. Plummer*, Kelyng, 109, 111, 117; *Regina v. Barrett*, Stephen's Digest of Criminal Law, art. 223, p. 146, note 4; *Foster's Crown Law*, 258. Although the proposition has received severe and well-known criticisms, among others from Lord Macaulay in the notes to his draft of a penal code for India, it would be hard to overrule it in view of the section of the Public Statutes to which we may have referred. Certainly, we have no occasion to do so in this case.

Exceptions overruled.

TRIAL, CRIMINAL—VIEW OF PREMISES.—The jury may, in the discretion of the court, be permitted to visit the scene of the *res gestae* in criminal cases: *State v. Perry*, 121 N. C. 533, 61 Am. St. Rep. 683. But whether or not in a given case a view should be allowed is purely a matter within the discretion of the trial court: See extended note to *Erwin v. Bulla*, 92 Am. Dec. 343.

TRIAL, CRIMINAL—JURORS.—The incompetency of some of the jurors summoned is not a ground for quashing the venire: *Arp v. State*, 97 Ala. 5, 38 Am. St. Rep. 137.

A WITNESS MAY BE IMPEACHED by showing that he made statements at the preliminary examination, or before the grand jury, contradictory of his evidence at the trial: *Jackson v. State*, 33 Tex. Cr. Rep. 281, 47 Am. St. Rep. 30, and note.

INSTRUCTIONS.—THE COURT IS NOT BOUND to instruct the jury in the language of a request, even when the instruction requested is proper: *State v. Hoxsie*, 15 R. I. 1, 2 Am. St. Rep. 838.

HOMICIDE, ACCIDENTAL—WHEN MURDER.—Homicide committed in the perpetration of a felony, or in an attempt to perpetrate a felony, is murder, even though the killing is unintentional: Note to *State v. Levelle*, 27 Am. St. Rep. 810.

WHOLLEY v. WESTERN ASSURANCE COMPANY.

[174 MASSACHUSETTS, 263.]

INSURANCE—WAIVER OF PROOF OF LOSS.—Where an insured sends notice of loss to an insurance company, and the company sends its adjuster to view the burned premises, after which, with the company's local agent, an agreement is made with the insured to leave the amount of the loss to another, on the basis of whose figures the company would settle, such agreement to settle constitutes a waiver of the proofs of loss required by the policy, since the adjuster was acting within the apparent scope of his authority.

N. P. Frye, for the plaintiff.

H. N. Shepard, C. H. Stebbins, and O. Storer, for the defendant.

²⁶⁴ **MORTON, J.** The defendant is a foreign insurance company with its principal office in Toronto, Canada. At the time of the issuing of the policy and of the loss it had a general agent in Boston and a local agent, one Fay, in Lawrence where the property was situated. The defendant does not contend now, as we understand it, that the policy did not attach and that a loss has not occurred under it. Its contention is that proofs of loss have not been furnished as required by the policy, and that there has been no arbitration to determine the amount of the loss which is a condition precedent to the bringing of an action in case the parties fail to agree upon the amount of the loss.

There was evidence tending to show that on the morning after the fire the plaintiff notified Fay, the local agent, of it, and that Fay thereupon notified the Boston office, and received from one Dooley, who it was admitted was a special agent or adjuster of the defendant company, a reply saying that the notice of loss had been received and that he would be in Lawrence on the following Tuesday and give the matter attention.

There was also evidence tending to show that Dooley went to Lawrence, and in company with Fay viewed the premises, and afterward with Fay saw the plaintiff and agreed with him that the amount of the loss should be left to one Flanders, a carpenter, and that the company would settle on the basis of his figures; that Flanders a few days after handed his figures to Fay, who forwarded them to Dooley, but received no reply either to that or subsequent letters to Dooley, and that nothing more

was ever done by Dooley or the company in relation to the matter.

We think that it would have been competent for the jury to find on this evidence that Dooley was sent by the general agent at Boston to Lawrence to investigate and adjust the loss, and that it was within the apparent scope of his authority to waive proofs of loss and to agree upon the amount of the loss, and that ²⁰⁵ he did so by agreeing to leave the matter to Flanders and to accept his figures as the basis of settlement. The notice of the fire was sent to the office in Boston, and it is hardly to be supposed that Dooley would have acted on it without some authority or direction from the general agent. It is admitted that he was an adjuster, and the natural import of his presence at the scene of the loss, after the notice to the Boston office and his reply, would be that he was there to settle and adjust the loss on behalf of the company, and with authority for that purpose. Under such circumstances, we think that the agreement to settle according to Flanders' figures could have been found to constitute a duly authorized waiver of the proofs of loss which were required by the policy: *Graves v. Merchants' etc. Ins. Co.*, 82 Iowa, 637, 31 Am. St. Rep. 507; *Brown v. State Ins. Co.*, 74 Iowa, 428, 7 Am. St. Rep. 495; *Hartford Ins. Co. v. Keating*, 86 Md. 130, 63 Am. St. Rep. 499; *Davidson v. Guardian Assur. Co.*, 176 Pa. St. 525; *Gould v. Dwelling-House Ins. Co.*, 134 Pa. St. 570, 19 Am. St. Rep. 717; *Perry v. Dwelling-House Ins. Co.*, 67 N. H. 291, 68 Am. St. Rep. 668; *Cooper v. Insurance Co. of Pennsylvania*, 96 Wis. 362; *Oshkosh Gaslight Co. v. Germania Ins. Co.*, 71 Wis. 454, 5 Am. St. Rep. 233; *McCollum v. Liverpool etc. Ins. Co.*, 67 Mo. App. 66; *Indiana Ins. Co. v. Capehart*, 108 Ind. 270; *Aetna Ins. Co. v. Shryer*, 85 Ind. 362; *Perry v. Faneuil Hall Ins. Co.*, 11 Fed. Rep. 482; *Mitchell v. Orient Ins. Co.*, 40 Ill. App. 111; *McPike v. Western Assur. Co.*, 61 Miss. 37; *New Orleans Ins. Co. v. Matthews*, 65 Miss. 301. See, contra, *Home Ins. Co. v. Sorsby*, 60 Miss. 302; *Hollis v. State Ins. Co.*, 65 Iowa, 454; *Everett v. London etc. Ins. Co.*, 142 Pa. St. 332, 24 Am. St. Rep. 499.

There was nothing left to arbitrate if the plaintiff and Dooley agreed to settle according to the figures of Flanders, and the condition in regard to arbitration would not therefore apply: *Hayes v. Milford Ins. Co.*, 170 Mass. 492, 497. It is not necessary to consider whether Dooley could have waived it. According to the report, if the ruling of the court that the action could

not be maintained was right, then judgment was to be entered on the verdict which was ordered for the defendant, otherwise the plaintiff was to have judgment for four hundred and thirty-five dollars. We think that there should be judgment for the plaintiff for the sum named.

So ordered.

INSURANCE—WAIVER OF PROOF OF LOSS.—If an insurance company makes a demand for arbitration, it is a waiver of proofs of loss: *Home Fire Ins. Co. v. Bean*, 42 Neb. 537, 47 Am. St. Rep. 711.

EVANS v. O'CONNOR.

[174 MASSACHUSETTS, 287.]

WITNESSES — INCRIMINATING TESTIMONY — PRIVILEGE.—Where a witness is connected with several distinct transactions which tend to incriminate him, all of which are material to the issues in the case, he does not waive his privilege of refusing to testify as to some of the incriminating transactions, by consenting to testify as to others. But he waives his privilege as to such transactions so far as the inquiry as to them is within the proper limits of a cross-examination.

ALIENATION OF AFFECTIONS—GIST OF ACTION FOR ADULTERY.—An action to recover damages for adultery committed with the plaintiff's wife is based upon his loss of consortium, and the alienation of affections is not the gist of the action, but is merely a matter of aggravation.

Two actions of tort. One against O'Connor to recover damages for adultery alleged to have been committed with the plaintiff's wife, and for the alienation of her affections. The other action against O'Connor and Merrill to recover damages for an alleged unlawful conspiracy of the defendants to debauch the plaintiff's wife and to induce her to commit adultery with the defendant O'Connor.

B. B. Jones, for the defendants.

H. J. Cole, for the plaintiff.

²⁸⁰ **LATHROP, J.** In these cases the plaintiff relied upon acts of adultery committed by the wife of the plaintiff with the defendant in the first case, in the years 1893, 1894, and 1895. The evidence as to the act in 1893 was as to one occasion only, and was very slight, though the evidence was abundant as to the acts of 1894 and 1895.

The first exception relates to the ruling of the presiding judge in regard to the right of the wife of the plaintiff to testify. She was called by the defendants, and desired to testify as to her relations with O'Connor in the year 1893, but not as to those in the years 1894 and 1895. She was instructed by the judge that if she testified as to matters in 1893, she could be cross-examined fully as to 1894 and 1895. The witness then declined to testify. We are of opinion that the defendants had a right to the testimony of the witness as to a distinct and separate transaction relied upon by the plaintiff, and that the witness ought to have been allowed to testify as to the year 1893, without waiving her privilege as to the years 1894 and 1895: *Low v. Mitchell*, 18 Me. 372. In this case the law is thus stated by Mr. Justice Shepley: "The rule that a witness is not obliged to criminate himself is well established. It is contended, however, that if the ²⁰¹ witness waives that privilege when testifying to one fact in the cause, he cannot claim it while testifying to any other fact material to the issue. If he consents to testify to one matter tending to criminate himself, he must testify fully in all respects relative to that matter so far as material to the issue. If he waives the privilege, he does so fully in relation to that act. But he does not thereby waive his privilege of refusing to reveal other unlawful acts, wholly unconnected with the act, of which he has spoken, even though they may be material to the issue. His consent to speak of one criminal act cannot deprive him of that protection, which the law affords him so far as respects other criminal acts not connected with it": See, also, *Lombard v. Mayberry*, 24 Neb. 674, 690, 8 Am. St. Rep. 234. If, however within the legitimate limits of cross-examination as to the fact testified to an inquiry is started as to other facts, the witness must be considered as having waived his privilege as to the latter so far as the inquiry as to them is within such limits, and he must answer even though his answers may tend to criminate him. We do not understand the ruling to have been thus limited by the presiding justice.

As the exception applies to both cases, the exceptions must be sustained in each case. It may be well, however, to say a few words on other points in the case. The jury were instructed that the basis of the action was the alienation of the wife's affections. This question was fully considered in *Bigaouette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307, where it was held that alienation of affections is not the gist of the action, but is merely a matter of aggravation; that the husband's right

of action is based upon his loss of consortium—"the right to the conjugal fellowship of the wife, to her company, co-operation, and aid in every conjugal relation." We are of opinion, however, that this point is not open to the defendant Merrill. There was no instruction requested in regard to it, and the exceptions to the instructions given were only so far as they varied or modified the instructions requested: See *Commonwealth v. Walsh*, 162 Mass. 242; *Fairman v. Boston etc. R. R. Co.*, 169 Mass. 170, 174.

The second case was originally brought against both the defendants, and charges them with unlawfully conspiring together to debauch the plaintiff's wife, and to induce her to commit ²⁹² adultery with the defendant O'Connor. During the trial the plaintiff discontinued as to O'Connor. Whether the plaintiff could recover against Merrill, under those circumstances, we need not consider, as no objection was made: See *May v. Wood*, 172 Mass. 11, 13, and cases cited. Nor need we consider whether the evidence was sufficient to warrant the jury in finding against Merrill, as it may be different on another trial.

Exceptions sustained.

Privilege of a Witness as to Incriminating Testimony.*

General Rule.—It is a general rule in the examination of witnesses that a witness may refuse to answer any question if the answer would tend to expose him to a criminal charge, or to any kind of punishment: *Grannis v. Branden*, 5 Day, 260, 5 Am. Dec. 143; *United States v. Lynn*, 2 Cranch C. C. 309; *Pleasant v. State*, 15 Ark. 624; *Taylor v. McIrvin*, 94 Ill. 488; *People v. Forbes*, 143 N. Y. 219; *Suthard v. Rexford*, 6 Cow. 255; *Rutherford v. Commonwealth*, 2 Met. (Ky.) 387; *Janvrin v. Scammon*, 29 N. H. 280; *Coburn v. Odell*, 30 N. H. 540; *Simmons v. Holster*, 13 Minn. 249.

This has been the established rule in England and America from the earliest times, and has been treated as a natural right to which everyone is entitled. In an early case in Georgia—*Marshall v. Riley*, 7 Ga. 367—it was said that "the maxim of the common law that no man is bound to accuse himself of any crime, or to furnish any evidence to convict himself of any crime, is founded in the great principles of constitutional right, and was not only settled in early times in England, but was brought by our ancestors to America as a part of their birthright. This is a maxim of the law, founded upon the principles of British freedom, and may be considered as one of our constitutional rights and privileges." The privilege may

***REFERENCES TO MONOGRAPHIC NOTES.**

Cross-examination of a defendant in a criminal prosecution: 33 Am. St. Rep. 895-898; 19 Am. Rep. 348, 349; 27 Am. Rep. 140-145; 33 Am. Rep. 540-547.
Privilege of witness: 21 Am. Dec. 55-62.

be claimed by the witness if the answer would even tend to incriminate him, the rule not being confined to matters which directly incriminate: *State v. Edwards*, 2 Nott & McC. 13, 10 Am. Dec. 557; *People v. Mather*, 4 Wend. 230, 21 Am. Dec. 122. If the answer would furnish one link in the chain of evidence which might convict, it is sufficient: *State v. Simmons Hardware Co.*, 109 Mo. 118; *Ward v. State*, 2 Mo. 120, 22 Am. Dec. 449; *Higdon v. Heard*, 14 Ga. 255; *Eaton v. Farmer*, 46 N. H. 200. In *People v. Mather*, 4 Wend. 230, 21 Am. Dec. 122, it was said that "when the disclosures he [the witness] may make can be used against him to procure his conviction for a criminal offense, or to charge him with penalties and forfeitures, he may stop in answering before he arrives at the question the answer to which may show directly his moral turpitude. . . . If there be a series of questions, the answer to all of which would establish his criminality, the party cannot pick out a particular one and say if that be put the answer will not criminate him. If it is one step having a tendency to criminate him he is not compelled to answer." Chief Justice Marshall, in discussing this question in *Burr's Trial*, 1 *Burr's Trial*, 244, said: "Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable, case that a witness, by disclosing a single fact, may complete the testimony against himself; and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is attainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws": See, further, *Counselman v. Hitchcock*, 142 U. S. 547; *Minters v. People*, 139 Ill. 363; *Smith v. Smith*, 116 N. C. 386.

If it reasonably appears that the answer would have a tendency to incriminate the witness, he cannot be compelled to answer: *Stevens v. State*, 50 Kan. 712. In this case, which was a prosecution for bastardy, the witness was asked whether he had had intercourse with the prosecutrix, and while it appeared that the witness was unmarried, he was allowed to claim his privilege. The situations are obviously innumerable where the question would arise as to the right of a witness to claim his privilege, and it would be of

little use to analyze the facts in the many cases in which the privilege has been claimed, since each case must stand upon its own facts, and it is only the principles underlying the decisions that are of paramount importance. The privilege applies not only to the ordinary witness in a case, but, as is apparent from the cases already cited, to the defendant in a criminal prosecution who has taken the stand to testify in his own behalf. The limits of the rule as applied to such a defendant will be noticed later: See *Temple v. Commonwealth*, 75 Va. 892. The privilege of a witness to refuse to testify extends not merely to testimony taken before a court upon the actual trial of a case, but to examinations before a grand jury: *People v. Lauder*, 82 Mich. 109; *Minters v. People*, 139 Ill. 363; *Counselman v. Hitchcock*, 142 U. S. 547; *People v. Seaman*, 8 Misc. Rep. 152; 29 N. Y. Supp. 329; *State v. Lewis*, 96 Iowa, 286; to examinations before legislative bodies: *Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22; and to examinations before any other body that has power to subpoena and compel the attendance of witnesses: *Eckstein's Appeal*, 148 Pa. St. 509. A witness must, however, appear and be sworn; his privilege is available to him only as a witness, and cannot be extended so as to excuse him from appearing: *People v. Lauder*, 82 Mich. 109; *Eckstein's Appeal*, 148 Pa. St. 509. The syllabus to the case last cited states the rule thus, that "a witness cannot refuse to appear and be sworn on the ground that he is already under indictment for alleged criminal connection with the matters which the committee propose to investigate, and that the answer to questions propounded to him might tend to prejudice him in the criminal proceedings then pending. The proper course would be for him to wait until the question is propounded to him which tends to criminate him, or which is in violation of any of his rights as a citizen, which question he can then decline to answer."

Constitutional Safeguards.—The constitution of the United States and the constitutions of most of the states contain provisions that no person can be compelled in any criminal case to be a witness against himself. These provisions have been the subject of considerable judicial construction, the question being whether or not the words "criminal case" apply solely to a criminal prosecution against the witness in which he is the defendant. Such a narrow construction would obviously tend to deprive a witness of much of the protection to which he is supposed to have been entitled, yet it has been adopted in New York as the proper construction of the constitutional guaranty, in cases where such testimony cannot subsequently be used against the witness. In *People v. Hackley*, 24 N. Y. 74, in construing such a constitutional provision the court said: "The primary and most obvious sense of the mandate is that a person prosecuted for a crime shall not be compelled to give evidence on behalf of the prosecution against himself in that case. It is urged that no such narrow and verbal construction could have been in the view of the authors of the article, for the reason that

no such atrocious procedure as that supposed has been tolerated in civilized countries in modern times. But constitutional provisions are not leveled solely at the evils most current at the times in which they are adopted, but, while embracing these, they look to the history of the abuses of political society in times past and in other countries and endeavor to form a system which shall protect the members of the state against those acts of oppression and misgovernment which unrestrained political or judicial power are always and everywhere most apt to fall into. . . . If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent or at least capable of proof, though his account of the transactions should never be used as evidence, it is the misfortune of his condition and not any want of humanity in the law. If the witness objects to a question on the ground that answer would criminate himself, he must allege, in substance, that his answer, if repeated as his admission on his own trial, would tend to prove him guilty of a criminal offense. If the case is so situated that a repetition of it on a prosecution against him is impossible, as where it is forbidden by a positive statute, I have seen no authority which holds or intimates that the witness is privileged. It is not within any reasonable construction of the language of the constitutional provision. The term 'criminal case,' as used in the clause, must be allowed some meaning, and none can be conceived other than a prosecution for a criminal offense. But it must be a prosecution against him; for what is forbidden is that he should be compelled to be a witness against himself. Now if he be prosecuted criminally touching the matter about which he has testified upon the trial of another person, the statute makes it impossible that his testimony given on that occasion should be used by the prosecution on the trial. It cannot, therefore, be said that in such a criminal case he has been made a witness against himself, by force of any compulsion used toward him to procure, in the other case, testimony which cannot possibly be used in the criminal case against himself. I conclude, therefore, that the relator was not protected by the constitution from answering." This decision does not ignore the fact that a witness may be compelled to disclose matters which might render easy his conviction of a crime. It would seem to be little short of a legal quibble to say that a man does not give testimony against himself when he discloses where all the evidence sufficient to convict himself may be found, especially in view of the fact that without such testimony from him no evidence whatever could be produced against him. The better and the more general rule is in conflict with the New York case, and is that the term "criminal case" includes any inquiry of whatever nature, if, under the law, a criminal prosecution could, under any circumstances, be commenced against the witness with respect to the matter concerning which he is asked to testify. The rule was very clearly stated by Beatty, C. J., in the case of *Ex parte Clarke*, 103 Cal. 352: "To bring a

person within the immunity of this provision, it is not necessary that the examination should be attempted in a criminal prosecution against the witness, or that such a prosecution should have been commenced and actually pending. It is sufficient if there is a law creating the offense under which the witness may be prosecuted. If there is such a law under which the witness may be indicted or otherwise prosecuted for a public offense arising out of the acts to which the examination relates, he cannot be compelled to answer in any collateral proceeding unless the law absolutely secures him against any use in a criminal prosecution of the evidence he may give; and this can only be done by a provision that, if he submits to the examination and answers the questions, he shall be exempt from any criminal prosecution for the offense to which the inquiry relates." The question was very elaborately discussed in *Counselman v. Hitchcock*, 142 U. S. 547, the court reaching the conclusion that whatever the wording of a constitutional provision might be, it was intended to give the same broad protection to a witness in the matter of testifying against himself as was given by the common law, and that the exemption corresponds with the common-law maxim, *Nemo tenetur seipsum accusare*, which has extended the greatest protection to a witness. The court quotes with approval from the opinion in *Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22, where, under a slightly different wording of the constitution of Massachusetts, the court said: "It is a reasonable construction to hold that it protects a person from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him. For all practical purposes, such disclosures would have the effect to furnish evidence against the party making them. They might furnish the only means of discovering the names of those who could give evidence concerning the transaction, the instrument by which a crime was perpetrated, or even the corpus delicti itself. Both the reason upon which the rule is founded, and the terms in which it is expressed, forbid that it should be limited to confessions of guilt, or statements which may be proved in subsequent prosecutions, as admissions of facts sought to be established therein." The rule as established by this case in the United States supreme court has been almost universally approved and followed: See, further, *State v. Simmons Hardware Co.*, 109 Mo. 118; *Smith v. Smith*, 116 N. C. 386; *Ex parte Cohen*, 104 Cal. 524, 43 Am. St. Rep. 127.

Penalties and Forfeitures.—The rule also extends to cases where the answer of a witness would tend to expose him to a penalty or a forfeiture. The witness may not only object to testifying to the main fact which would subject him to a penalty or forfeiture, but may also refuse to disclose any one of a series of facts which together would expose him to such penalty or forfeiture: *Rawlings v. Hall*, 1 Car. & P. 11; *Henry v. Salina Bank*, 1 N. Y. 83; *People v.*

Rector, 19 Wend. 569; *Simmons v. Holster*, 13 Minn. 249; *Matter of Dickinson*, 58 How. Pr. 260; *Wyckoff v. Wagner Typewriter Co.*, 99 Fed. Rep. 158. In *Lees v. United States*, 150 U. S. 476, where an action civil in form was brought to recover a penalty for importing an alien under contract to perform labor, in violation of an act of Congress, it was held that, while the action was civil in form, it was undoubtedly criminal in its nature, and the defendant could not be compelled to be a witness against himself. *Boyd v. United States*, 116 U. S. 616, is a case similar in principle. These cases were distinguished in principle from the case of *Levy v. Superior Court*, 105 Cal. 600. In this case, in pursuance of a statute, an action was brought by an administrator to recover property of the estate of a decedent, alleged to have been embezzled by the defendant and converted to his own use. The statute provided, as a means of enforcing the civil remedy, redress in the way of imprisonment and damages under certain conditions. The defendant *Levy* was cited to appear and be examined respecting the property of the deceased. He objected on the ground that he could not be compelled to testify against himself. But the court held, *McFarland, J.*, dissenting, that the statute under which the proceeding was brought was remedial and not penal in character, and that the constitutional protection to a witness did not apply. The privilege of a witness, therefore, does not apply to penalties of a purely remedial character, and the court stated the distinction between the provisions of a remedial statute for the enforcement of the remedy and a penal statute to be, that the penalty imposed by the remedial statute is not imposed as a punishment for a public wrong, but as redress for a private grievance.

Equity follows the common law in respect to the privilege of a witness to refuse to testify where he would be subject to penalties or forfeitures. This was clearly stated in the case of *Polindexter v. Davis*, 6 Gratt. 481, where the court said: "It is not the province of equity to do more than justice between the parties litigant before it, and it leaves whatever savors of punishment or penal retribution to the rigors of the common law. It therefore not only refuses directly to enforce penalties and forfeitures, but will not for such a purpose exercise its ancillary jurisdiction in aid of a common-law forum, and especially when it is called upon to compel a discovery on oath from the party sought to be subjected. In the last respect, indeed, it conforms to the spirit of the common law, which, jealous of the liberty of the citizen, protects him from being made his own accuser, or forced to give evidence against himself. The rule of equity on this subject is not confined to cases where the purpose of the suit itself, or of the action to which it is ancillary, is to enforce the penalty or forfeiture; but extends to those where the discovery itself would expose the party to some other action or suit, or any criminal or penal prosecution tending to the like result. Nor is it material whether the penalty or forfeiture arises out of the

common or statute law, or is imposed by some conveyance, devise, or contract, giving to the act of the party which he is called upon to discover, the effect of divesting or defeating his title or estate."

Disgrace.—There is even at the present day some conflict in the decisions as to whether the privilege of a witness to decline to answer a question extends to answers which tend to disgrace him merely, and which cannot tend to subject him either to a criminal prosecution or to suffer a penalty or forfeiture. There is no doubt that the early trend of judicial authority, especially in England, was to allow a witness to refuse to answer any question that tended to degrade his moral character, or, more properly speaking, his moral reputation: *Pleasant v. State*, 15 Ark. 624; *Fries v. Brugler*, 11 N. J. Eq. 79, 21 Am. Dec. 52. Even in those cases in which the witness has been allowed to claim his privilege because his answer would disgrace him and subject him to infamy, the courts have placed some limitation on the right. We have seen that if the answer of a witness would tend, even in a remote degree, to incriminate him by furnishing the slightest clue which might be used in a prosecution against him, it is sufficient, and the witness may claim his privilege. But as regards answers which would merely disgrace the witness the rule is different. In such a case, the mere tendency of the answer to disgrace the witness is wholly insufficient to permit the witness to refuse to answer. The answer must directly show the disgrace, and this must clearly appear to the court. This was brought out pointedly in the case of *People v. Mather*, 4 Wend. 230, 21 Am. Dec. 122. The court said: "Where the privilege arises from an apprehension that the answer will expose the character of the witness to the reproach of moral turpitude, as distinguished from the danger of a criminal prosecution, it is not enough for the witness to allege that his answer will have a tendency to expose him to infamy or disgrace. The question must be such that the answer to it, which he may be required by the obligation of his oath to give, will directly show the infamy, and the court must see that such will be the case before they will allow the excuse to prevail. . . . My conclusion is, that where a witness claims to be excused from answering a question because the answer may disgrace him, or render him infamous, the court must see that the answer may, without the intervention of other facts, fix on him moral turpitude." It must be said that there is much reason for the rule that a witness need not disclose that which will certainly disgrace him. These reasons were forcibly stated by Grosscup, J., in *United States v. James*, 60 Fed. Rep. 257: "The privilege which the framers of the amendment secured was silence against the accusation of the federal government. . . . Did they originate such privilege simply to safeguard themselves against the law inflicted penalties and forfeitures? Did they take no thought of the pains of practical outlawry? The stated penalties and forfeitures of the law might be set aside; but was there no pain in disfavor and odium among neighbors, in excommunication from church or

societies that might be governed by the prevailing views, in the private liabilities that the law might authorize, or in the unfathomable disgrace, not susceptible of formulation in language, which a known violation of law brings upon the offender? Then, too, if the immunity was only against the law inflicted pains and penalties, the government could probe the secrets of every conversation, or society, by extending compulsory pardon to one of its participants, and thus turn him into an involuntary informer. Did the framers contemplate that this privilege of silence was exchangeable always, at the will of the government, for a remission of the participant's own penalties, upon a condition of disclosure, that would bring those to whom he had plighted his faith and loyalty within the grasp of the prosecutor? I cannot think so. . . . It may be that the offense is of an ancient date, and has been succeeded by years of immaculate conduct and citizenship. Exposure, self-confessed exposure, would lose him his place in society, his good name in the world, and, like a bill of attainder, taint his blood and that of all who inherit it."

The clear trend of modern authority is, however, away from the rule laid down by Judge Grosscup, and the practice of compelling a witness to answer any question, where he cannot be subjected to a penalty, is very generally recognized, even though the answer disgraces the witness. This tendency of the modern decisions was pointed out as early as 1838 in *People v. Rector*, 19 Wend. 569. The same rule was applied in *People v. Abbot*, 19 Wend. 192. There is no doubt that the statutes granting complete immunity to a witness who testifies have had a potent influence in bringing the courts to adopt this view of the extent of a witness' privilege. Such statutes would, indeed, have little effect if, notwithstanding the pardon which they extend to witnesses, the witnesses were at liberty to refuse to testify. The prevailing rule undoubtedly is that a witness is not privileged from testifying as to matters which merely tend to disgrace him and subject him to infamy. The court, in *Brown v. Walker*, 161 U. S. 591, stated the rule thus: "If the answer of the witness may have a tendency to disgrace him or bring him into disrepute, and the proposed evidence be material to the issue on trial, the great weight of authority is that he may be compelled to answer, although, if the answer can have no effect upon the case, except so far as to impair the credibility of the witness, he may fall back upon his privilege." A similar decision was reached in this case on its hearing before the circuit court (*Brown v. Walker*, 70 Fed. Rep. 46), where the court said: "To our mind, it is clear the infamy or disgrace to a witness which may result from disclosures made by him are not matters against which the constitution shields, and that so long as such disclosures do not concern a crime of which he may be convicted, the provision quoted does not apply." To the same effect see *Clark v. Reese*, 35 Cal. 89; *Jennings v. Prentice*, 39 Mich. 421; *Moline Wagon Co. v. Preston*, 39 Ill. App. 358; *Hill v. State*, 4 Ind. 112; *Rutherford v. Common-*

wealth, 2 Met. (Ky.) 387; *Clementine v. State*, 14 Mo. 112. In *Jennings v. Prentice*, 89 Mich. 421, Judge Cooley stated that a witness "dishonesty or fraud, when not criminal, may as properly be proved by him as by any other person." As already noticed, however, the matter must be material to the issues in the case in order to make it something of which the witness is bound to testify. This was indicated by the court in *Weldon v. Burch*, 12 Ill. 374, in quoting from *Greenleaf on Evidence*: "On this point, there has been a great diversity of opinion, and the law still remains not perfectly settled by authorities. But the conflict of opinions may be somewhat reconciled by a distinction, which has been very properly taken, between cases where the testimony is relevant and material to the issue, and cases where the question is not strictly relevant, but is collateral, and is asked only under the latitude allowed in a cross-examination. In the former case, there seems a great absurdity in excluding the testimony of a witness, merely because it will tend to degrade himself, when others have a direct interest in that testimony, and it is essential to the establishment of their rights of property, of liberty, or even of life, or to the course of public justice. Upon such a rule, one who had been convicted and punished for an offense, when called as a witness against an accomplice, would be excused from testifying in any of the transactions in which he had participated with the accused, and thus the guilty might escape. And, accordingly, the better opinion seems to be that where the transaction forms any part of the issue to be tried, the witness will be obliged to give evidence, however strongly it may reflect on his character.' We have no hesitation in adopting the rule thus laid down. A party ought not to be deprived of the benefit of testimony material to the issue in the case, nor ought the course of public justice to be defeated, merely because a witness may subject himself to disgrace or reproach. The privilege of the witness ought not to be considered as superior to the rights of individuals, or the demands of public justice. He is required to speak of a transaction in which he voluntarily participated. If he sustains a loss of reputation in consequence of disclosures, it is but the result of his own wrong." The rule is now very generally established in harmony with the reasoning of this case. In *People v. McClave*, 57 Hun, 587, it was held that the privilege of the witness could not be invoked where the investigation was by police commissioners of a charge against a police sergeant for conduct unbecoming an officer. And in *Sullivan v. Newman*, 63 Hun, 625, 17 N. Y. Supp. 424, a witness was required to testify that he had been convicted of a crime, though it was held that it would not have been competent to have compelled him to testify that he had been indicted simply.

What is Testifying Against Self.—A witness cannot be compelled to testify against himself either by acts or words. Compelling a witness to stand up for the purpose of identifying him is not a violation of this privilege, however. In holding this, it was said in

State v. Reasby, 100 Iowa, 231: "The court appears not to have known who the defendant was, and had the right to cause him to identify himself. The fact that he was accused of the crime was not evidence of guilt, and to require him to stand in the presence of the witnesses and jury did not compel him to furnish evidence of his guilt. We are not aware of any rule of law which entitles the defendant, in a criminal case, to remain concealed during his trial, lest his presence might aid in his identification; yet, the rule contended for by the defendant, carried to its logical conclusion, would lead to that result." In a similar case in New York—*People v. Gardner*, 144 N. Y. 119, 43 Am. St. Rep. 741—the court said: "We do not think the defendant's constitutional right was violated, or that he was compelled, within the meaning of the constitutional provisions referred to, to give evidence against himself. He was bound to be in court and in the presence of the jury, the recorder, and the witnesses who might be there. The recorder, the jurors, and the witnesses had the right to see him and he had the right to see them. It was necessary that he should be identified as the person named in the indictment and charged with the crime. His mere standing up did not identify him with the alleged crime, and did not disclose any act connected with the crime. There was nothing on his person or in his appearance that in any way connected him with the crime, or furnished any evidence whatever of his guilt." In *Williams v. State*, 98 Ala. 52, where the defendant was indicted for night walking, it was held proper to have her stand up before the jury to allow them to judge of her age, where she had voluntarily taken the witness stand in her own behalf. If the defendant had not voluntarily become a witness, however, the court said this action of the trial court would have been an invasion of her constitutional immunity. In such a case the standing up before the jury for scrutiny would have been for something more than for mere identification: See, also, *State v. Johnson*, 67 N. C. 55. The recalling of a defendant after he has already voluntarily testified is not making him give testimony against himself. He may be recalled the same as any other witness: *Clay v. State* (Tex. Crim. App. 1899), 51 S. W. Rep. 370.

There is some conflict in the decisions as to what constitutes testifying against one's self. Care must be taken to determine whether there is involved a real question of giving incriminating testimony. If a defendant has voluntarily taken the witness stand to testify in his own behalf, he may be properly cross-examined concerning every matter brought out on direct examination. He has waived his privilege by taking the stand in the first instance, and what might be objectionable ordinarily, because it tended to incriminate him, cannot be urged after he has testified in his own behalf. Such a case is *Williams v. State*, 98 Ala. 52. Then there is a class of cases where evidence may be forcibly taken from the accused and used on the trial. For example, a murderer may be

taken before his dying victim, and the declarations of the victim at that time may be proved as dying declarations. Likewise a thief may have the stolen property forcibly taken from him, and such property is admissible in evidence against him. Counterfeit money, lottery tickets, and gambling devices may be taken from an accused and be used at the trial to establish his guilt. None of these cases violate the constitutional privilege of a witness, and by the introduction of such evidence a witness is not compelled to testify against himself: See *Commonwealth v. Dana*, 2 Met. 329; *State v. Pomeroy*, 130 Mo. 489; *Boyd v. United States*, 116 U. S. 616; *People v. Gardner*, 144 N. Y. 119, 43 Am. St. Rep. 741. In these cases the accused is not entitled to the property or the evidence which has been taken from him. The party from whom the property has been stolen, or the state, which alone is entitled to coin money, have a right to the property which has been seized. The situation, however, is different where the evidence in the possession of the accused is his own to which he is legally entitled. And it would seem that under such circumstances compelling him to do an act or to furnish any documents would be furnishing self-incriminating testimony within the meaning of the constitutional prohibition. But the courts have not always adopted such a liberal construction. In *State v. Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530, the defendant was compelled to exhibit his arm so as to show certain tattoo marks, the court holding that evidence of physical facts cannot, either upon principle or reason, come within the letter or the spirit of the constitutional prohibition. And yet these very physical facts may be the missing links that connect a person with the crime charged against him. This was the case in *State v. Jacobs*, 5 Jones, 259, where it was held that the accused should have been allowed to claim his privilege. Here the vital question in issue was whether the accused was a free negro or not, and the trial court compelled the defendant to exhibit himself to the jury so that they might determine by inspection his quality and condition—his blood or race. This case has been much criticised, but it would seem that if by close inspection the jury could have determined his race, and this was the vital point connecting him with the crime, compelling him to stand up for inspection would be furnishing evidence against himself, and that the case was correctly decided. In *Stokes v. State*, 5 Baxt. 619, 30 Am. Rep. 72, it was held improper to allow the prosecution to bring a pan of mud into court and place it immediately in front of the jury, and after proving that the mud was about as soft as the mud where the track of the criminal was found, to ask the accused to put his foot in the mud. And in *Blackwell v. State*, 67 Ga. 76, 44 Am. Rep. 717, the place at which the prisoner's leg was amputated being a material point, it was held to be error for the court to require the prisoner to show his limb, so that it might be ascertained at what point it was amputated. In the last two cases cited the defendant was in court, and it was sought to have the court compel him to do an act which, while merely the

production of evidence as to physical facts, yet would tend to connect him with the crime. The question seems to be more difficult if the evidence has been forcibly secured outside of court and been introduced at the trial. In *State v. Graham*, 74 N. C. 648, 21 Am. Rep. 493, an officer who had arrested a prisoner charged with larceny, compelled him to put his foot in a track found near where the larceny was committed and testified as to the result of the comparison, and the court held that the evidence was properly admissible, that it was not procured by duress, and the defendant was not testifying against himself. *Walker v. State*, 7 Tex. App. 245, 32 Am. Rep. 595, is of the same character and directly approves the North Carolina case. *Myers v. State*, 97 Ga. 76, is a case somewhat different, since here the shoes of the defendant were taken and compared with the tracks made at the place of the crime, and it has always been deemed proper to take from the defendant any article which would tend to connect him with the crime. The defendant did no act and was required to do no act himself. The officer simply took from him an article which afterward testified against him. There seems to have been drawn a distinction between acts which a defendant witness may be compelled to do in court on the trial of the case, and acts which he has been compelled to do outside of the court and proof of which has been permitted. In the cases noticed above, a defendant was not compelled to put his foot in mud which was brought into court, and yet where he was obliged by the officer to do the same thing out of court, evidence of the result of such experiment was permitted to be introduced. There would seem to be no real difference between the two cases, and in *Day v. State*, 68 Ga. 667, such evidence was held to be inadmissible in a case where the accused had been compelled to place his foot in a track made near the scene of the crime. As was suggested by Baldwin, J., in his opinion in *State v. Griswold*, 67 Conn. 290, it would seem to be allowing the state to profit by its own wrong to admit evidence which has been illegally secured by its own officers. It is true that a court, generally speaking, will not take notice of how evidence is secured, providing it is admissible in any event. It is a collateral issue whether evidence which is offered was obtained lawfully or unlawfully, and that it was illegally obtained is no reason for its rejection: *Commonwealth v. Dana*, 2 Met. 329; *State v. Griswold*, 67 Conn. 290; *State v. Pomeroy*, 130 Mo. 489; *Gindrat v. People*, 138 Ill. 103. But we believe this rule should be limited in its application to civil cases and to criminal cases where the subject of the crime is taken from the accused, and the public or the complainant has an interest in it or in its destruction: See *Cooley's Constitutional Limitations*, 370. Otherwise, it would seem to be simply a question of whether the officer was strong enough to compel the accused to do an act which will be used against him on his trial, and which would be deemed compelling him to testify against himself if the court attempted to require him to do the same act. Yet the weight of authority seems

to be in favor of the rule that evidence, however illegally it may have been secured, may be introduced if it is competent, relevant, and material. In *Gindrat v. People*, 138 Ill. 103, it was said that "courts, in the administration of the criminal law, are not accustomed to be oversensitive in regard to the sources from which evidence comes, and will avail themselves of all evidence that is competent and pertinent, and not subversive of some constitutional or legal right." The reason for the admission of such evidence was stated in *State v. Flynn*, 36 N. H. 64, as being that it was not in any sense the evidence of the accused, but belonged solely to the party who secured it. "The information thus acquired," said the court, "is not the admission of the party, nor evidence given by him, in any sense. The party has in his power certain mute witnesses, as they may be called, which he endeavors to keep out of sight, so that they may not disclose the facts which he is desirous to conceal. By force or fraud access is gained to them, and they are examined, to see what evidence they bear. That evidence is theirs, not their owner's. If a party should have the power to keep out of sight, or out of reach, persons who can give evidence of facts he desires to suppress, and he attempts to do that, but is defeated by force or cunning, the testimony given by such witnesses is not his testimony, nor evidence which he has been compelled to furnish against himself. It is their own. It does not seem to us possible to establish a sound distinction between that case, and the case of the counterfeit bills, the forger's implements, the false keys, or the like, which have been obtained by similar means. The evidence is in no sense his." This case was approved in *State v. Pomeroy*, 130 Mo. 489. We believe, however, that there is a valid distinction between the cases which should be established, and which the above cases refused to recognize. This distinction as supported by Judge Cooley we have already noticed, viz., that in criminal cases it is only where the public or the complainant has an interest in the property taken from the accused or an interest in its destruction that it is admissible in evidence against him, and that the rule should not apply to the private personal papers of the accused, and certainly should not be applied to the compelling the accused to do an act which will serve directly to connect him with the crime. Lottery tickets may properly be taken from the desk of the accused and be used as evidence against him: *State v. Pomeroy*, 130 Mo. 489. And it has been held that an envelope with pictures taken from the premises of the accused by a trespasser is admissible in evidence to show incriminating conduct on the part of the accused in respect to the envelope and its contents: *State v. Griswold*, 67 Conn. 290. This opinion was unnecessary to the decision of the case, since the search of the premises and the seizure of papers was permitted by the agent of the accused. Certainly, a trial court could not compel a witness to produce private papers which would tend to incriminate him: *Lamson v. Boyden*, 160 Ill. 613; *McGinnis v. State*, 24 Ind. 500. An accused on trial for a crime cannot be

required, against his objection, to try on a shoe to determine whether tracks found at the scene of the crime were his: *People v. Mead*, 50 Mich. 228. In *People v. McCoy*, 45 How. Pr. 216, it was correctly held that the forcible examination, under an order of the coroner, of a female prisoner by physicians, for the purpose of obtaining evidence that she had been pregnant and had been delivered of a child within two or three weeks previous, was in violation of her constitutional privilege of not being compelled to testify against herself. The court very properly observed that "they might as well have sworn the prisoner, and compelled her by threats to testify that she had been pregnant and been delivered of the child, as to have compelled her by threats to allow them to look into her person, with the aid of a speculum, to ascertain whether she had been pregnant and been recently delivered of a child." And yet this was only a physical fact, if such facts are proper to compel a witness to disclose. And, seemingly, the only substantial difference between such an examination and compelling an accused to put his foot in a track is one of degree. The first conclusively connects the accused with the offense, while the latter only tends to that end, which is, however, sufficient to bring the act within the protection of the rule. In *Spicer v. State*, 69 Ala. 159, the woman consented to a physical examination by the physicians, though the court apparently approves the rule that if the evidence secured is extorted illegally, it is nevertheless competent evidence against the accused.

When the Privilege Should be Claimed.—We have already seen that a witness must appear and be sworn. The time for him to claim his privilege is when the incriminating question is asked: *Ex parte Park*, 87 Tex. Civ. Rep. 590, 66 Am. St. Rep. 835. A refusal to be sworn would be a contempt of court: *Ex parte Stice*, 70 Cal. 51. In England, it would seem that a witness may claim his privilege at any stage of the inquiry, and after he has claimed his privilege he cannot be compelled to answer any additional questions. The witness is entitled to his protection whether he has already answered the question in part or not at all: *Regina v. Garbett*, 1 Den. C. C. 236; *King of Two Sicilies v. Willcox*, 1 Sim., N. S., 301. The rule in the United States is different, however, the weight of authority holding that if the witness, without claiming his privilege understandingly discloses part of a material transaction in which he was concerned, he must state the entire transaction: *State v. Nichols*, 29 Minn. 357; *Commonwealth v. Price*, 10 Gray, 472, 71 Am. Dec. 668; *State v. Foster*, 23 N. H. 348, 55 Am. Dec. 191; *Norfolk v. Gaylord*, 28 Conn. 309; *Commonwealth v. Pratt*, 126 Mass. 462; *Este v. Wilshire*, 44 Ohio St. 636; *Samuel v. People*, 164 Ill. 379; *People v. Freshour*, 55 Cal. 375. There is authority for the rule that a witness may in his direct examination stop at any point he sees fit, and his cross-examination cannot touch any point not mentioned in his direct examination: *Cooley's Constitutional Limitations*, 6th ed., 384.

The Cross-examination of a witness and particularly of an accused in a criminal case is a question involved in more or less uncertainty. The limits of such an examination are not clearly defined, and the rules governing it are to a considerable extent conflicting in the different states. We are concerned with its limits only so far as incriminating questions are concerned. So far as the general limit in asking questions is concerned, it is proper to ask a witness a question although its answer would tend to criminate him. The witness may refuse to answer the question, but his right to do so is a mere privilege which he may waive. It is, therefore, no ground for objection that the question asked tends to criminate the witness: Fries v. Brugler, 12 N. J. L. 79, 21 Am. Dec. 52; People v. Abbot, 19 Wend. 192. Compare State v. Abey (Iowa), 80 N. W. Rep. 225. The mere fact that an answer to the question would tend to incriminate the witness does not relieve him from the necessity of answering unless he claims his privilege. He must answer if he does not claim his privilege: People v. Smith, 37 N. Y. App. Div. 280; People v. Webster, 189 N. Y. 73.

The general rule may be stated to be that where a defendant takes the stand as a witness in his own behalf he waives his right to refuse to answer questions which tend to incriminate him concerning all matters which were touched upon in his direct examination, and upon all other matters which are so related to his direct examination as to come within the proper limits of cross-examination. In other words, the defendant loses his character as a party, becomes a mere witness, and may be examined as fully as any other witness. If he makes any statement respecting the transaction, he may be required to state all: Samuel v. People, 164 Ill. 379; Coburn v. Odell, 80 N. H. 540, and cases previously cited. He may be examined and must answer concerning all matters which are relevant to the case, whether testified to on the direct examination or not: People v. Court of Sessions, 82 Hun, 242; People v. Tice, 131 N. Y. 651; State v. Duncan, 7 Wash. 336, 38 Am. St. Rep. 888; State v. Murphy, 45 La. Ann. 958; Commonwealth v. Muller, 97 Mass. 545; Thomas v. State, 103 Ind. 419; State v. Wentworth, 65 Me. 234, 20 Am. Rep. 688; State v. Clinton, 67 Mo. 380, 29 Am. Rep. 506; State v. Fay, 43 Iowa, 651; Yanke v. State, 51 Wis. 464; State v. Allen, 107 N. C. 805; People v. Noelke, 94 N. Y. 137, 46 Am. Rep. 128; Connors v. People, 50 N. Y. 240; State v. Over, 52 N. H. 459, 13 Am. Rep. 88; State v. Thomas, 98 N. C. 599, 2 Am. St. Rep. 351. An ordinary witness occupies the same position as a defendant in a criminal case. Such a witness is not bound to testify concerning any fact which may tend to criminate him. But if he voluntarily answers in part, he waives his privilege, and may be fully cross-examined: Commonwealth v. Smith, 163 Mass. 411; Foster v. Pierce, 11 Cush. 437, 59 Am. Dec. 152; Commonwealth v. Pratt, 126 Mass. 462; Ex parte Park, 37 Tex. Cr. Rep. 590, 66 Am. St. Rep. 835. The only difference between the two is this that an ordinary witness has a right to stop

when he is first questioned in respect to facts which tend to criminate him, while a defendant in a criminal case knows in advance that such questions are to be put to him, and that he is to testify as to his guilt or innocence, and he waives his constitutional protection in advance. If a defendant refuses to testify on cross-examination as to any relevant matter, and fails to explain a fact tending to show his guilt, the same presumption arises from his failure that would arise from a failure to give an explanation by any other witness: *Stover v. People*, 56 N. Y. 315; *People v. Court of Sessions*, 82 Hun, 242; *Andrews v. Frye*, 104 Mass. 234.

In those jurisdictions where this broad rule prevails, the scope of the cross-examination is determined regardless of the extent of the direct examination and limited only by the subject matter at issue and the general rules regulating cross-examination: *Guy v. State* (Md.), 44 Atl. Rep. 997. All relevant matters, however adverse to him they may be, are proper subjects of inquiry. So where a defendant took the stand in his own behalf, it was proper to ask him on cross-examination whether he had not refused to testify before the grand jury on the ground that his answers would tend to incriminate him. Such matter is relevant and has a tendency to throw a doubt upon the truth of his present testimony: *Commonwealth v. Smith*, 163 Mass. 411. The mere fact that the defendant takes the stand operates as a complete waiver of his constitutional privilege, so far as such privilege relates to the disclosure of facts relevant to the case: *Commonwealth v. Smith*, 163 Mass. 411; *State v. Kent*, 5 N. Dak. 516.

In sustaining the right to cross-examine fully, the court said in *People v. Tice*, 131 N. Y. 651, that "if the constitutional protection can be interposed at any point in the examination, we do not perceive any logical reason why it may not be invoked to protect the accused against answering questions affecting his credibility, and also to prevent an examination as to relevant facts, or indeed as to any fact, whether pertaining to his testimony in chief or not." Hence, there is permitted the widest latitude in the cross-examination. In Indiana, while the cross-examination must be confined to the subject opened by direct examination, "yet where the subject is opened by the direct examination, the cross-examining counsel may go fully into the details of the subject, and is not confined to the particular part of it embraced within the questions asked upon the direct examination. A subject cannot be so partitioned by a direct examination as to cut down the cross-examination to the specific matters developed by the questions of the counsel who conducts the examination in chief, for, once a subject is entered upon, it is opened to a full and detailed investigation on cross-examination": *Boyle v. State*, 105 Ind. 469, 55 Am. Rep. 218. The examination of an accused seems, therefore, to be as broad as the examination of any other witness. In *Rains v. State*, 88 Ala. 91, where the accused in a murder prosecution had taken the stand in his own behalf, it was held proper to ask him on cross-examination

where he was each day and night from the night of the killing until he was arrested, about a week afterward. Where a witness denies he has written a document which is alleged to be a forgery, or has denied his signature thereto, he may, on cross-examination, be required to write in open court, that the jury may compare his writing with the alleged forged document: *Bradford v. People*, 22 Colo. 157.

The general range and extent of cross-examination is within the discretion of the trial judge, subject to the limitation that it must relate to matters pertinent to the issue, or to specific acts which tend to discredit the witness or impeach his moral character: *People v. Oyer* etc. Court, 83 N. Y. 437; *People v. Brown*, 72 N. Y. 571. 28 Am. Rep. 183; *People v. Orapo*, 76 N. Y. 288, 82 Am. Rep. 302. The discretion of the trial court in allowing cross-examination is not subject to review except in cases of manifest abuse or injustice: *Turnpike Road Co. v. Loomis*, 82 N. Y. 127, 88 Am. Dec. 311; *People v. Casey*, 72 N. Y. 393; *Hanoff v. State*, 37 Ohio St. 178, 41 Am. Rep. 496.

Any facts relevant to the issue and which tend to convict him of the crime for which he is being tried, may be inquired about on cross-examination, even though such facts tend to show the defendant witness guilty of another crime: *State v. Kent*, 5 N. Dak. 516. If the connection between the two crimes is such that the proof is relevant to the issue, the incidental circumstance that he confesses to the commission of another offense does not render the evidence objectionable. "This is unavoidable," said the court in *State v. Witham*, 72 Me. 531. "If a person accused of crime takes the benefit of his own swearing, he takes its risks." In this case the defendant was indicted for adultery, and his refusal to testify in a former trial in a different case was used as an admission against him. In commenting on the scope of his cross-examination the court said: "When the accused volunteers to testify in his own behalf at all, upon the issue whether the alleged crime has been committed or not, he volunteers to testify in full. His oath in such case requires it. If he waives the constitutional privilege at all, he waives it all. He cannot retire under shelter when danger comes. The door opened by him is shut against retreat."

In *Commonwealth v. Nichols*, 114 Mass. 285, 19 Am. Rep. 346, upon a trial for adultery, the defendant, on becoming a witness in his own behalf, was cross-examined as to other acts of adultery committed by the same parties near the time charged. Such evidence being competent to be proved in support of the indictment in question, it was proper to cross-examine the defendant concerning them. All relevant evidence is admissible whether it tends to show him guilty of another crime or not. Where, in a murder trial, the defendant was asked on cross-examination whether he had not killed another man in the same conflict, such examination was held proper as being a part of the *res gestae*. All matters connected with the offense may be inquired into: *Hargrove v. State*

(Tex.), 26 S. W. Rep. 993. Cross-examination as to other offenses should, however, be confined to facts relevant and material to the case. Hence, where one was on trial for selling liquor without a license, the commission of other similar offenses could not be shown on cross-examination: *Fossdahl v. State*, 89 Wis. 482. In *Holder v. State*, 58 Ark. 473, where the defendant was on trial for murder, it was held improper on cross-examination to ask the defendant whether he had not committed rape five years before. The ruling was correct, since the answer might criminate the witness and was not relevant to any issue in the case. A defendant in a criminal prosecution by testifying in his own behalf waives his right to refuse to answer incriminating questions only so far as the charge under investigation is concerned. As to other offenses he is privileged from answering, unless they are relevant to the issues in the case. The rule was stated thus in *Saylor v. Commonwealth* (Ky.), 30 S. W. Rep. 390: "The fact that he does so waive it [his privilege] does not give the commonwealth the right to compel him to admit the commission of other offenses which would subject him to punishment, presentment, or infamy. If this was done, it would be in utter disregard of the bill of rights, and in many instances deter a person accused of an offense from going on the stand as a witness for himself, as a forced confession of another offense might subject him to punishment far greater than the charge under investigation." The defendant may be cross-examined as to other crimes for the purpose of showing a motive for the commission of the crime for which he is being tried. Such collateral crimes must, however, bear such relation to the offense for which he is being tried that the court can clearly see that, if established, they will have a tendency to furnish a motive for the commission of the other crime: *State v. Kent*, 5 N. Dak. 516; *People v. Bussey*, 82 Mich. 49.

There seems to be this difference between a defendant witness and an ordinary witness in testifying concerning collateral offenses: In the case of a defendant witness, as we have seen, he may be required to testify on cross-examination as to any facts relevant and material to the main issue in the case, even though such testimony tends to show that he is guilty of another crime. As to such testimony, material and relevant to the main issue in the case, he has waived his privilege by taking the stand in his own behalf. With an ordinary witness this is not the case, as the principal case shows. An ordinary witness does not, by taking the stand, agree to testify as to everything pertinent to the issue, and he has not in the slightest degree waived his privilege of refusing to testify concerning incriminating matters. Hence when such questions are asked he may refuse to testify, however material to the issues in the case they may be. And a waiver of his privilege as to one incriminating act constitutes no waiver of his privilege as to other unconnected acts, even though the latter may be material to the issue. Such is the rule of the principal case and it is clearly cor-

rect: See *Low v. Mitchell*, 18 Me. 372; *Lombard v. Mayberry*, 24 Neb. 674, 8 Am. St. Rep. 234.

A witness may always be impeached, and when a defendant becomes a witness in his own behalf, he thereby places in issue his reputation for truth and veracity. We need not examine to what extent his general moral character may be assailed since this does not necessarily involve incriminating testimony; neither need we examine those cases holding that he may be examined concerning prior convictions or arrests, since these do not tend to criminate him, though they may tend to disgrace him. How far can he be cross-examined as to the commission of particular offenses, when the answers would have a criminating tendency? Facts and not mere accusations may be inquired about to a certain extent, for mere accusations do not tend to impeach a witness' credibility: *People v. Crapo*, 76 N. Y. 288, 32 Am. Rep. 302; *State v. Kent*, 5 N. Dak. 516. In Texas, a witness may be cross-examined concerning accusations for crimes involving moral turpitude: *Brittain v. State*, 36 Tex. Cr. Rep. 406. Generally, it is within the discretion of the court to examine concerning accusations and indictments: *Wallace v. State* (Fla.), 26 South. Rep. 713, and cases cited. The necessity for a rule allowing a witness to be examined concerning specific acts was discussed in *Real v. People*, 42 N. Y. 270, and it was held that such cross-examination was proper. In *People v. Noelke*, 94 N. Y. 137, 46 Am. Rep. 128, on a trial for selling lottery tickets, the court allowed the defendant to be asked whether he had been engaged in the lottery business for a period before the offense with which he was charged. The particular offenses about which the defendant may be cross-examined should be relevant to the question of credibility, or the examination is improper. Offenses which in their nature are not inconsistent with the veracity of the defendant should not be inquired into, since they could not affect the credit of the witness. There is, however, some difference of opinion as to what offenses discredit the witness and will serve to render him less worthy of belief. In *People v. Irving*, 95 N. Y. 541, on a trial for assault, it was deemed proper to examine the witness as to other alleged assaults which he had committed, for the purpose of discrediting him. On the other hand, in *State v. Huff*, 11 Nev. 17, the court refused to permit a cross-examination as to assaults and batteries committed by the witness, saying that "no legitimate inference of the untruthfulness of a witness can be drawn from the fact that he had been convicted of frequent assaults and batteries. It could be inferred that he was a violent tempered and perhaps a dangerous man, but not that he was a liar." In *People v. Hooghkirk*, 96 N. Y. 149, where the defendant, who was on trial for arson, had taken the witness stand in his own behalf, it was held proper to cross-examine the witness as to his connection with other fires and respecting insurance on other property burned, the matter tending to affect his credibility.

While examination as to collateral crimes is as a rule proper to affect credibility, the witness may, nevertheless, claim his privilege if his answer will tend to criminate him. A defendant witness does not place himself in any worse position than any other witness by testifying in his own behalf, and any ordinary witness would clearly have the right to refuse to answer criminating questions. Of course, as to the particular crime for which he is on trial, he has waived his privilege by becoming a witness, but this waiver does not extend to other and collateral crimes unless, as we have seen, they are relevant to the crime with which he is charged. Hence, as to proper cross-examination concerning collateral crimes he may claim his privilege: *People v. Webster*, 139 N. Y. 73; *Wallace v. State* (Fla.), 26 South. Rep. 713; *Georgia R. R. etc. Co. v. Lybrend*, 90 Ga. 421; *State v. Bacon*, 13 Or. 143, 57 Am. Rep. 8; *State v. Ekanger*, 8 N. Dak. 559. When such questions are asked solely to affect the witness' credibility, the mere claiming of his privilege, on the ground that his answer will tend to criminate him, impeaches his credibility before the jury as fully as if he had answered the question in the affirmative, so that the discrediting purpose of the question is accomplished and the witness is protected at the same time: *State v. Kent*, 5 N. Dak. 516. If this was not the rule, and if the defendant witness was not permitted to claim his privilege, it might be possible to draw out admissions of crimes far more serious than that for which the defendant is being tried, and it might be perilous for him to take the stand in his own behalf. Questions put for the sole purpose of disgracing the witness should not be allowed: *Wallace v. State* (Fla.), 26 South. Rep. 713. Generally, the inquiry respecting collateral crimes must relate to transactions comparatively recent, in order to have any bearing on the character or credit of the witness: *Wallace v. State* (Fla.), 26 South. Rep. 713; *State v. Kent*, 5 N. Dak. 516. In California, the rule is established by statute that a witness cannot be impeached by evidence of particular wrongful acts: *Cal. Code Civ. Proc.*, sec. 2051; *People v. O'Brien*, 96 Cal. 171.

There are some jurisdictions in which the rule does not prevail that a defendant, by becoming a witness in his own behalf, subjects himself to the fullest examination. This rule, as formulated by Judge Cooley, and which is directly disapproved by many of the authorities we have already cited, is as follows: "If he [the defendant] does testify, he is at liberty to stop at any point he chooses, and it must be left to the jury to give a statement, which he declines to make a full one, such weight as, under the circumstances, they think it entitled to; otherwise, the statute must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself, and the statutory privilege becomes a snare and a danger": *Cooley's Constitutional Limitations*, 6th ed., 384. Under such a rule, the cross-examination cannot extend beyond the facts to which he has

testified on his direct examination: *State v. Lurch*, 12 Or. 99; *Gale v. People*, 26 Mich. 158. Michigan does not seem to follow this rule at present: *People v. Howard*, 73 Mich. 10; and the weight of authority is clearly opposed to it. *State v. O'Hara*, 17 Wash. 525, seems to support the rule, though there are other Washington cases which sanction the fullest cross-examination: See *State v. Duncan*, 7 Wash. 336, 38 Am. St. Rep. 888.

The general rule allowing the fullest cross-examination of a defendant in a criminal case where he voluntarily becomes a witness in his own behalf has been limited in some states by statute. The California Penal Code, section 1323, provides that if a defendant "offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief." It is clear that this provision limits the cross-examination, but to what extent is a matter of some doubt. The trial court is not allowed the same discretion as to the extent and scope of the cross-examination which it is permitted to exercise in the examination of the other witnesses: *People v. O'Brien*, 96 Cal. 171. In *People v. O'Brien*, 66 Cal. 602, it was determined that a defendant witness could not be examined as to any facts or matters not testified to by him on his examination in chief, and to permit a more extensive cross-examination by the trial court was to violate the defendant's privilege secured to him by the constitution. Hence, where a defendant on direct examination testifies as to what takes place up to the time of his arrest, he cannot be cross-examined about anything that occurred subsequent to the arrest: *People v. Wong Ah Leong*, 99 Cal. 440. See *People v. Crowley*, 100 Cal. 478, where the question of cross-examination is elaborately discussed. The rule in California is perhaps not so limited by the Penal Code as might be expected. In *People v. Gallagher*, 100 Cal. 466, the court said that the effect of section 1323 of the Penal Code "is to take from the court any discretion which it might ordinarily exercise in allowing the range of a cross-examination to extend beyond the matter brought out upon the direct examination, and to prevent the prosecution from questioning the defendant upon the case generally, and in effect making him its own witness. The statute does not, however, place any limitation or restriction upon the extent or character of his cross-examination 'as to all matters about which he was examined in chief'; and upon those matters he may be cross-examined as fully as any other witness. Any question which would have the tendency to elicit from him the whole truth about any matter upon which he had been examined in chief or which would explain, or qualify, or destroy the force of his direct testimony, whether it be to give the whole of a conversation or transaction of which he had given only a part, or to show by his own admissions that he had made contrary statements, or that his conduct had been inconsistent with the statements given in his direct testimony, and thus throw discredit upon them, would be legitimate cross-examination."

Missouri has in like manner limited by statute the cross-examina-

tion of a defendant to matters testified to on direct examination: *Mo. Rev. Stats.*, sec. 1918; *State v. Patterson*, 88 Mo. 88, 57 Am. Rep. 374; *State v. Graves*, 95 Mo. 510; *State v. Brooks*, 92 Mo. 542, 581; *State v. Beaucleigh*, 92 Mo. 490. The same rule prevails in Louisiana: *State v. Underwood*, 44 La. Ann. 852; *State v. Baker*, 43 La. Ann. 1168.

The prosecution cannot make a defendant in a criminal case its own witness against his consent: *State v. Cohn*, 9 Nev. 179. Neither can he be recalled by the prosecution to be examined as its own witness, though he may be recalled for proper cross-examination: *State v. Horne*, 9 Kan. 119; *State v. Lewis*, 56 Kan. 374; *Thomas v. State*, 100 Ala. 53.

Personal Privilege.—The privilege of a witness to refuse to answer a criminating question is one that is personal to himself, he alone being entitled to invoke its protection. But his right to refuse is a mere privilege which he may waive: *Fries v. Brugler*, 12 N. J. L. 79, 21 Am. Dec. 52; *Ex parte Senior*, 37 Fla. 1; *Cloyes v. Thayer*, 3 Hill, 564; *McCreery v. Ghormley*, 9 N. Y. App. Div. 221; *State v. Ekan-ger*, 8 N. Dak. 550. A party to the suit cannot claim the privilege for the witness, whether the party is the one who called him or not: *Morgan v. Halberstadt*, 60 Fed. Rep. 592; *Commonwealth v. Shaw*, 4 Cush. 594, 50 Am. Dec. 813; *Commonwealth v. Gould*, 158 Mass. 490; *Newcomb v. State*, 37 Miss. 383; *Boyer v. Teague*, 106 N. C. 576, 19 Am. St. Rep. 547; *Duncan v. State (Tex.)*, 51 S. W. Rep. 372; *State v. Kennedy (Mo.)*, 55 S. W. Rep. 293; *Brown v. State (Tex.)*, 20 S. W. Rep. 924. Neither can a party assign error on the court's refusal to inform a witness that he need not answer the questions propounded to him if such answers would tend to criminate him: *Bolen v. People*, 184 Ill. 338; *Commonwealth v. Shaw*, 4 Cush. 594, 50 Am. Dec. 813. Where, however, a witness does not bring himself within the rule, and the court allows his privilege in a case where it should not, then the party who has been wrongfully deprived of his testimony and has been injured thereby may object and secure appropriate relief on appeal: *Clark v. Reese*, 35 Cal. 89; *Cloyes v. Thayer*, 3 Hill, 564. A party may likewise object to a witness answering, where the question is not pertinent to the issues in the case, and the objection should be sustained whether the witness objects to answering or not. The objection of the party in such a case is not based on the privilege of the witness: See *Sharon v. Sharon*, 79 Cal. 633; *Sodusky v. McGee*, 5 J. J. Marsh. 621. In *Alston v. State*, 109 Ala. 51, it was held that a question so framed that a responsive answer prima facie tends to criminate the witness is objectionable, and need not be answered. This rule would seem to be correct if the witness himself declines to answer, and in such a case he is not obliged to base his refusal on the ground that it would criminate him. But since the privilege of refusing to answer is nothing more than a privilege which the witness may waive, it would seem that the question itself, if relevant, was

not an improper one to ask, and that an objection to it could not be sustained if the witness was willing to answer it.

The rule is also well settled that, generally, the objection that an answer, if made, may tend to criminate the witness is not such an objection as counsel may take advantage of to exclude testimony. This necessarily follows from the previous rule that the privilege of refusing to testify is personal to the witness: *Lothrop v. Roberts*, 16 Colo. 250; *Bradford v. People*, 22 Colo. 157; *Ward v. People*, 6 Hill, 144; *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688; *San Antonio St. Ry. Co. v. Muth*, 7 Tex. Civ. App. 443; *State v. Butler*, 47 S. C. 25; *Eggers v. Fox*, 177 Ill. 185. The question of privilege is purely one between the witness and the court, and it might seem, therefore, that if the court understands that the witness claims his privilege, it would be immaterial whether this claim were made by the witness in person or through his counsel. This was held in *Clifton v. Granger*, 86 Iowa, 573, where the court said that the rule did not require that the witness should in person address the court and claim the privilege. *People v. Brown*, 72 N. Y. 571, 28 Am. Rep. 183, seems to sustain a similar doctrine. There is no doubt that counsel, in protecting their clients, may raise the point, and call the court's attention to the matter, and ask that the witness be apprised of his rights, and given the opportunity to claim his privilege if he so desires. But we believe the better rule is laid down in *State v. Kent*, 5 N. Dak. 516, where it was said that the witness must claim the privilege in person, and must state under oath that the answer will tend to criminate him. If he is not required to claim his privilege under oath, there is no way a defendant in a criminal case can have his credibility impeached by showing from him that he has committed other offenses, or by compelling him to claim his privilege which will equally tend to impeach his credibility. A jury will always draw an unfavorable conclusion by reason of a witness refusing to testify because the answer will criminate him. But this is the penalty he must pay for his protection. The privilege is not given to screen the credibility of the witness. But if the witness is not obliged to personally claim his privilege under oath, and can allow his counsel to claim it for him, there is no admission by the witness under oath which tends to discredit him, and the real benefit to be derived by the party examining the witness from such a discrediting admission by the witness is very largely lost. Even if counsel do attempt to claim the privilege for the witness, the witness may answer, and an objection by counsel to such answer is without effect: *Taylor v. State*, 83 Ga. 647.

Who Determines Tendency of Answer.—It is undoubtedly the correct rule that it is for the court to determine whether or not any direct answer to a question will furnish evidence against a witness: *Ward v. State*, 2 Mo. 126, 22 Am. Dec. 440; *Minters v. People*, 139 Ill. 363; *Wyckoff v. Wagner etc. Co.*, 99 Fed. Rep. 158; *Ex parte Senior*, 37 Fla. 1; *Ex parte Park*, 37 Tex. Cr. Rep. 590, 66 Am. St. Rep. 835; *State v. Thaden*, 43 Minn. 253. All that is required, however, is

that it may appear to the court that the fact upon which the witness is interrogated may form one link in the chain of evidence which would lead to his conviction: *Stevens v. State*, 50 Kan. 712; *Ford v. State*, 29 Ind. 541, 95 Am. Dec. 658. Chief Justice Marshall, in *1 Burr's Trial*, 424, stated the rule thus: "It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony which would be sufficient to convict him of any crime, he is not bound to answer it, so as to furnish matter for that conviction."

A witness cannot avoid answering any question by the mere statement that the answer would tend to incriminate him, without regard to whether the statement is reasonable or not: *Ex parte Irvine*, 74 Fed. Rep. 954. The court determines the matter from all the circumstances of the case, but without requiring him to explain how his answer will criminate him. But unless the court can see that the witness will not be criminated, the privilege will be recognized and protected: *Janvrin v. Scammon*, 29 N. H. 280; *Coburn v. Odell*, 30 N. H. 540. A witness will not, however, be permitted to make any fraudulent use of his privilege. And when the court can discover no reasonable theory upon which the answer could be incriminating, it may deny the privilege, or make further investigation: *State v. Kent*, 5 N. Dak. 518. We have already noticed that a distinction has been drawn between answers which are incriminating and those which merely tend to disgrace the witness. In the first case the court will allow the privilege if there is any possibility that the answer may tend to incriminate the witness. But where the answer will disgrace the witness, in those jurisdictions where such a privilege exists, the court must be able to see that whatever answer the witness gives it will directly show the infamy. But in both cases the question is one for the court to determine: *People v. Mather*, 4 Wend. 230, 21 Am. Dec. 122.

The courts have differed at times as to what will criminate a witness, and for this reason the rule is and should be liberally construed in favor of the witness, for a strict construction is likely to defeat its object. The cases of *Minters v. People*, 139 Ill. 363, and *Ward v. State*, 2 Mo. 120, 22 Am. Dec. 449, furnish good examples of how courts may differ as to whether an answer will tend to criminate a witness or not. In both cases the general rule is recognized that a witness need not answer even that which tends to criminate him by furnishing one link in the chain of evidence that might convict him. In the *Illinois* case, the witness stated before the grand jury that he knew of persons playing cards for money, and, when asked to name such persons, he refused on the ground that his answer would give evidence which would tend to convict him. The supreme court upheld his privilege, on the ground that a party to a game of cards, if obliged to give the names of

others playing in the same game, tends to furnish proof of his criminal participation. This is clearly correct, although if the witness had simply been in a place where he saw others play he could be compelled to disclose all he saw. The Missouri case held the contrary of the above proposition, and said that a witness who was a participant in the illegal betting could be compelled to give the names of the others who participated, though from the Illinois case it is clear that the evidence given furnished a link in the chain by means of which it would be comparatively easy to secure evidence against him sufficient to convict him.

While it is true that a witness will not be allowed to make a fraudulent use of his privilege, yet the question of good faith frequently does not enter into the matter at all. "Where from the evidence and the nature of the question, the court can definitely determine that the question, if answered in a particular way, will form a link in the chain of evidence to establish the commission of a crime by the witness, the court cannot inquire whether the witness claimed his privilege in good faith or otherwise. It is only where the criminating effect of the question is doubtful that witness' motive may be considered, for in such case his bad faith would tend to show that his answer would not subject him to the danger of a criminal prosecution or help to prove him guilty of a crime": *Ex parte Irvine*, 74 Fed. Rep. 954.

Some of the courts have, at least seemingly, adopted a more liberal rule than we have stated above, and hold that it is for the witness and not for the court to judge whether his answer to a question will tend to criminate him; and that the duty of the court is to so instruct him with reference to his rights as to enable him to decide understandingly: *State v. Edwards*, 2 Nott & McC. 13, 10 Am. Dec. 557. Even in the jurisdictions which seem to hold this rule there is this limitation, viz., that if it is perfectly clear to the court that the witness is mistaken, or that he is acting in bad faith, the privilege will not be allowed. This must, however, be perfectly clear to the court: *Chamberlain v. Willson*, 12 Vt. 491, 36 Am. Dec. 856; *Temple v. Commonwealth*, 75 Va. 892; *People v. Forbes*, 143 N. Y. 219. This last case cited is undoubtedly a border line one. It related to an investigation before a grand jury. It seems that the students of one of the classes of Cornell University were holding a banquet, and during the banquet some persons, presumably students, injected a poisonous gas into the dining-hall and kitchen, causing the death of one person and seriously affecting others. The witness in question, Taylor, was subpoenaed before the grand jury. After he had testified that he had no connection whatever with the transaction, he refused to answer some other questions on the ground that they would tend to criminate him. The court of appeals sustained him in claiming his privilege, and said: "It was argued that the relator could not possibly be put in peril by his answer to the question, since he had already testified that he had

no connection with the transaction. But this conclusion was not warranted by the facts. The testimony of the witness might be ever so strong and clear in favor of his innocence, but it did not conclude the public prosecutor, in the absence of some constitutional or statutory provision securing the relator from prosecution. The general statements of a person charged with crime in regard to his innocence avail but little against incriminating facts and circumstances. . . . The witness who knows what the court does not know, and what he cannot disclose without accusing himself, must in such cases judge for himself as to the effect of his answer, and if, to his mind, it may constitute a link in the chain of testimony, sufficient to convict him, when other facts are shown, or to put him in jeopardy, or subject him to the hazard of a criminal charge, indictment, or trial, he may remain silent."

What Deprives Witness of Privilege.—We have already found the general rule to be that an accused, by taking the stand to testify in his own behalf, waives his privilege so far as it relates to the crime with which he is charged and to all matters material and pertinent thereto. In addition to the cases already cited, see *Pyland v. State* (Tex.), 26 S. W. Rep. 621; *State v. Allen*, 107 N. C. 805; *State v. Thaden*, 43 Minn. 253; *State v. Tall*, 43 Minn. 273. A general denial that the witness has any connection whatever with a crime does not deprive him of his privilege: *People v. Forbes*, 143 N. Y. 219. There seems to be a difference of opinion as to whether testifying before a grand jury deprives a witness of his privilege so that he cannot claim it at the trial of the case. The better rule is that the witness can claim his privilege at the trial, notwithstanding he may have voluntarily testified before the grand jury: *Temple v. Commonwealth*, 75 Va. 892; *People v. Lauder*, 82 Mich. 109. The contrary is held in Iowa: *State v. Van Winkle*, 80 Iowa, 15. There would seem to be no substantial reason why a witness should not have the right to claim his privilege at every separate investigation or trial of the offense. The rule seems general that a waiver of one's privilege at one trial does not constitute a waiver at a subsequent trial of the same case: *Emery v. State*, 101 Wis. 627; *Georgia R. R. etc. Co. v. Lybrend*, 99 Ga. 421. The Iowa case just cited—*State v. Van Winkle*, 80 Iowa, 15—bases its decision, that testifying before the grand jury constitutes a waiver of a witness' privilege at the trial, upon the doctrine that a witness who understandingly discloses part of a transaction exposing him to a criminal prosecution without claiming his privilege, is ordinarily obliged to go forward and make a full disclosure of the transaction. This doctrine, however, has no application unless the disclosure can be regarded as one continuous account, which manifestly occurs where it is made at a single trial of the case. But separate trials are not so connected as to make testimony at one a continuous statement with the testimony at another which requires the disclosure of other evidence at the subsequent trial. Similarly a grand jury investigation and a subsequent trial are wholly disconnected. And the fact

that the witness has testified before the coroner does not deprive him of his privilege at the trial: *Cullen v. Commonwealth*, 24 Gratt, 624. This was clearly brought out in *Samuel v. People*, 164 Ill. 379, where the witness had signed an affidavit of the truth of the allegations in an information upon which the prosecution was based, and at the trial of the case it was urged that he could not claim his privilege, since, by making a partial statement in the affidavit, he waived his privilege and was obliged to make a complete disclosure. But the supreme court sustained the privilege of the witness and said: "This doctrine [requiring full disclosure] can have no application here, unless the statements, made in the affidavit indorsed upon the information, and the statements, made in the testimony elicited upon the trial, may be regarded as parts of one continuous account. We do not think, however, that, under the doctrine thus invoked, the affidavit and the evidence on the trial can be thus run together so as to be considered one statement. The doctrine applies only to a case where the witness, while testifying upon the trial, states a fact and afterward refuses to give the details, or disclose a part of a transaction, in which he was criminally concerned, without claiming his privilege, and then refuses to go forward and state the whole; it does not apply to a case, where some admission made long prior to the trial is sought to be brought forward and joined to the answers given on the trial." A witness does not waive his privilege by answering a question put to him by the presiding judge: *Hackney v. State*, 101 Ga. 512. Where a witness on his examination voluntarily exposes his unlawful act, further testimony can neither detract from nor add to the force and effect of the evidence he has already given, and he has therefore waived his privilege and may be required to testify: *Eggers v. Fox*, 177 Ill. 185. After an acquittal upon a criminal charge, it is too late for a witness to refuse to answer questions on the ground that his answers may tend to criminate him: *Lothrop v. Roberts*, 16 Colo. 250; *People v. Ogle*, 104 N. Y. 511. Generally speaking, a witness may be compelled to testify to facts which show him guilty of the commission of a crime, provided, at the time the evidence is elicited, the statute of limitations has become a bar to a prosecution for that crime: *Childs v. Merrill*, 66 Vt. 302; *Manchester etc. R. R. v. Concord R. R.*, 66 N. H. 100, 49 Am. St. Rep. 582; *Prussing v. Jackson*, 85 Ill. App. 324. A witness cannot, however, be deprived of his privilege on the ground that a prosecution for such offense is barred by the statute of limitations, unless it appears affirmatively that no prosecution is pending against him at the time he is called upon to produce such evidence: *Lamson v. Boyden*, 160 Ill. 613; *Southern Ry. News Co. v. Russell*, 91 Ga. 808.

Statutes Abridging the Privilege and Granting Immunity against Prosecution.—There seems to be no doubt but that the common-law rule that a witness is not required to testify against himself may be changed by statute: *People v. Hackley*, 24 N. Y. 74. But where the privilege of a witness is secured by means of a constitutional guar-

anty, the power of the legislature to abridge it is greatly lessened. In fact, legislation cannot abridge a constitutional privilege, and a legislative enactment in order to have any effect at all must be as broad in its scope and effect as the constitutional provision itself, and the protection accorded to the witness must be as extensive under the statute as it was under the constitution, otherwise the statute will clearly be unconstitutional and of no effect. To this extent the authorities are in harmony, but the application of this accepted doctrine to various statutory enactments has resulted in considerable practical conflict in the decisions. All agree that a statute requiring a witness to testify must at the same time protect the witness in the manner and to the extent required by the constitution. But to what extent do the constitutions of the various states give protection? Must the protection given by a statute include complete and absolute immunity from all penalty with respect to the crime about which he testifies? In other words, must there be a complete wiping out of the offense as to him? Or is it sufficient if the statute provides merely that the answers of the witness shall not be used as evidence against him? The latter rule is held in some jurisdictions, upon the theory that a witness is not testifying against himself where his own answers are not used as evidence against him: See *State v. Quarles*, 13 Ark. 307; *Cossart v. State*, 14 Ark. 539; *Pleasant v. State*, 15 Ark. 624, 649; *Higdon v. Heard*, 14 Ga. 255; *Bedgood v. State*, 115 Ind. 275; *La Fontaine v. Southern etc. Assn.*, 83 N. C. 132; *Ex parte Buskett*, 106 Mo. 602, 27 Am. St. Rep. 378; *Gilpin v. Daly*, 59 Hun, 413; *People v. Sharp*, 107 N. Y. 427, 1 Am. St. Rep. 851; *People v. Hackley*, 24 N. Y. 74. The obvious fallacy of these cases lies in this, that most of them ignore the plain fact that a witness who is compelled to disclose matters which will lead to his prosecution, and to reveal the existence of evidence ample to secure his conviction, is as clearly testifying against himself as if his own admission of guilt were introduced in evidence against him. The last case cited does not ignore this argument however, but in rejecting it says that "neither the law nor the constitution is so sedulous to screen the guilty as the argument supposes. If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent or at least capable of proof, . . . it is the misfortune of his condition and not any want of humanity in the law. If a witness objects to a question on the ground that an answer would criminate himself, he must allege, in substance, that his answer, if repeated as his admission on his own trial, would tend to prove him guilty of a criminal offense. If the case is so situated that a repetition of it on a prosecution against him is impossible, as where it is forbidden by a positive statute, I have seen no authority which holds or intimates that the witness is privileged. It is not within any reasonable construction of the language of the constitutional provision."

All of these cases just cited, however, were decided prior to the

leading case in the United States supreme court of *Counselman v. Hitchcock*, 142 U. S. 547. With the weight of the United States supreme court against these cases, it is very probable that they will not be followed elsewhere and are reasonably likely to be overruled themselves. There can be no doubt that the better rule is, as established by this case of *Counselman v. Hitchcock*, 142 U. S. 547, that a statutory enactment requiring a witness to give criminating testimony, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. No statute which leaves the witness subject to prosecution, after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the constitution. "It is a reasonable construction, we think," said the court, "of the constitutional provision that the witness is protected 'from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him.'" This quotation was taken from *Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22, which sustains the same rule. Prior to *Counselman v. Hitchcock*, 142 U. S. 547, the conflict in the decisions was based on the difference in the wording of the various state constitutions. But this case clearly shows that though somewhat different in wording, "there is really, in spirit and principle, no distinction arising out of such difference of language," and that "the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have, as far as possible, the same interpretation; and that where the constitution, as in the cases of Massachusetts and New Hampshire, declares that the subject shall not be 'compelled to accuse or furnish evidence against himself,' such a provision should not have a different interpretation from that which belongs to constitutions like those of the United States and of New York, which declare that no person shall be 'compelled in any criminal case to be a witness against himself'": See, as supporting the same rule, *Brown v. Walker*, 161 U. S. 591; 70 Fed. Rep. 46; *Ex parte Cohen*, 104 Cal. 524, 43 Am. St. Rep. 127; *Oullen v. Commonwealth*, 24 Gratt. 624; *State v. Nowell*, 58 N. H. 314; *Ex parte Irvine*, 74 Fed. Rep. 954; *In re Scott*, 95 Fed. Rep. 815. The practice of recommending an accomplice to the pardon of the executive, when the government calls him as a witness, and the equitable right of such accomplice to an executive pardon, if he fully and fairly states the truth, is not sufficient immunity, and does not do away with the constitutional privilege of refusing to give evidence against one's self: *Ex parte Irvine*, 74 Fed. Rep. 954. The immunity must be given and guaranteed by a statute. The protection accorded by the constitution does not extend so as to protect one from

disgrace and infamy, as we have seen, so that under statutes granting immunity from prosecution, it is immaterial that the answer of a witness will subject him to disgrace: *Brown v. Walker*, 70 Fed. Rep. 46; affirmed in 161 U. S. 591. The strong opinion to the contrary of Judge Grosscup in *United States v. James*, 60 Fed. Rep. 257, was without avail in changing the current of American authority. The immunity granted by a statute, if complete, is sufficient, although there is a bare possibility that the witness by his disclosure might be subjected to the criminal laws of some other sovereignty. It was never the object of the constitutional provision to obviate such dangers: *Brown v. Walker*, 161 U. S. 591, 608. Immunity, however, which is granted by an act of Congress applies both to the federal and to the state courts. This was so held where a witness attempted to claim his privilege when testifying before the interstate commerce commission. He urged that although the statute afforded him absolute immunity against prosecution, this could apply only to the federal courts, and that he might be subjected to prosecution in the state courts. But the supreme court, in *Brown v. Walker*, 161 U. S. 591, held otherwise, that an act of Congress was effective in the state courts, and the witness was, therefore, amply protected and could not claim his privilege. A statute granting immunity from prosecution to a witness who appears and testifies applies to witnesses before a grand jury as well as to witnesses before a court: *Elliott v. State (Tex.)*, 19 S. W. Rep. 249. Statutory immunity, relating to the offense of obtaining money by cornering the market, is not complete but is conditional, where it requires the repayment of such money before the accused person shall be discharged from any further punishment, and the statute is, therefore, unconstitutional: *Lamson v. Boyden*, 160 Ill. 613. The immunity granted by a statute relates to all prosecutions of the same general character. Hence a statute relating to testimony given by a witness in reference to bribery includes bribery of all kinds, whether at common law, under the constitution, or under a statute: *Commonwealth v. Bell*, 145 Pa. St. 374. The same act might, however, constitute two offenses, and the statute would grant immunity to the witness from prosecution and punishment only for the offense for which the accused was being tried. In such a case, the witness may claim his privilege, since the protection given by the statute includes but one of the offenses, and is, therefore, not coextensive with the constitutional guaranty. Hence it has been held that on an indictment for selling liquor to a minor, such minor could not be compelled to testify to the purchase, where such testimony might incriminate him of an entirely distinct offense: *State v. Bach Liquor Co.*, 67 Ark. 163. And in *United States v. Price*, 96 Fed. Rep. 980, it was held that the amnesty granted by the interstate commerce act related only to violations of such act, and did not include other crimes, even though they might grow out of the violation of the act.

ASLANIAN v. DOSTUMIAN.

[174 MASSACHUSETTS, 323.]

FOREIGN LAWS—LAW MERCHANT IN TURKEY—PRESUMPTION.—There is no presumption that the law merchant, with its customs relative to protest and notice, prevails in Turkey, and such law cannot be resorted to in determining the probable construction of a contract collateral to a draft which is payable in that country.

W. S. B. Hopkins and G. S. Taft, for Dostumian.

J. R. Kane, for the plaintiff.

329 HOLMES, C. J. This is an action to recover the equivalent of money paid by the plaintiff to the defendants for a draft in favor of a third person, payable at Harpoot, in Turkey in Asia. The plaintiff's testimony was that it was agreed orally at the time when the draft was purchased that if it was not paid the money should be returned. The drawees refused to pay, but the draft was not protested. In his charge to the jury, the judge stated that he could not say whether or not the law merchant prevailed in Turkey; that there was no evidence whether it did or not; and that it would not necessarily govern unless the jury found that the parties expressly agreed that it should. To these statements the defendants excepted.

The plaintiff was a stranger to the draft. He based his rights upon a collateral agreement. Whether that agreement was an out and out promise to refund if the draft was not paid, or only a promise to do so if all steps were taken to charge the drawers, which are customary in this part of the world, depended on what the parties saw fit to say. There was no presumption about it one way or the other. This seems to have been the judge's view, for after the remarks excepted to he went on to say that the plaintiff put his case upon the theory that the contract was entirely inconsistent with the notion that his rights were dependent upon protest or the law merchant, and he left it to the jury whether the plaintiff had proved such a contract.

In view of the nature of the case, it may be that the judge meant no more than to make a collateral remark which he regarded as immaterial, that he did not know whether the law merchant did or did not prevail in Turkey in Asia, as a preliminary to telling the jury that the question before them was what kind of a contract, if any, the parties had made in fact. There was no evidence that anything was said about protest or notice;

and if the jury found a contract, as they did, it would be going pretty far to let them read into the simple words, "if the Dr. Bagdasarian won't pay in Harpoot, you bring those checks; we give you the money back again"—a limitation which made the plaintiff's rights in Worcester dependent upon the conduct of a stranger, an Armenian, who was in a remote and disturbed part of Asia, and over whom the plaintiff ³⁸⁰ had no control. The very fact that the drawers contemplated the possibility of a refusal to pay looks the other way. If the ground of refusal was true, that the drawers had no assets in the drawees' hands, it may be that they were not entitled to proof of demand and notice: *Kinsley v. Robinson*, 21 Pick. 327; *Pierce v. Indseth*, 106 U. S. 546, 551. And upon the whole, the natural interpretation would be that if the drawees refused to pay the plaintiff was to have his money back without further condition than the surrender of the draft. The draft was tendered to the defendants by the plaintiff.

At all events it is clear that under the instructions the jury could not have found for the plaintiff unless they found such a simple unqualified promise, and therefore the question does not arise whether the remarks excepted to would have been correct if the promise had been only to be liable to the plaintiff according to the tenor of the draft.

If, however, in view of the contract having been voluntarily proposed by the defendants as incident to the sale of the draft, it should be argued that the jury would have been warranted in finding that the contract did not purport to enlarge the extent of the defendants' liability, and that from that point of view their finding conceivably might have been affected by the consideration that our law of protest did or did not prevail at Harpoot, and so that what the judge said was material in this aspect of the case, it is to be noticed that no such suggestion was made, even in the argument before us, and that it is evident that no such suggestion was in the mind of anyone at the trial. It rather looks, on the contrary, as if no one had kept in mind distinctly that the suit was neither upon the draft nor by a party to it.

If, notwithstanding the foregoing considerations, we come to the correctness of the judge's statement and treat it as implying what he did not say, that the jury had no right to presume that the law of Harpoot was similar to ours, we are not prepared to say that he was wrong. It will be observed that the question is not whether the drawer in Massachusetts by implication stipu-

lated in his draft for notice of nonpayment, or any question as to notice, but a naked question whether it could be presumed that in Harpoot the custom as to protest was the ³³¹ same as ours, as bearing on the probable construction of the collateral contract with the plaintiff.

No doubt devices for the transfer of debts or values without an actual transport of money or goods may have been contrived at different places and at different times. They may be as old as commerce. But it cannot be assumed that they always have taken the same form. There is a presumption that the common law, as we understand it, is the common law, and often, if not always, that it is the law of other common-law states; but there is no presumption that it prevails all over the world: *Savage v. O'Neil*, 44 N. Y. 298, 300, 301; *Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143; *Flato v. Mulhall*, 72 Mo. 522; 2 *Starkie on Evidence*, 4th Am. ed., 568; *Wharton on Evidence*, secs. 314, 315, 1292. There is no such presumption as to the so-called law merchant taken as meaning substantive law. The law merchant in this sense is merely a vaguely defined portion of the common law, or, in its widest interpretation, of the law of European countries, having the Roman and the Frankish law for its parents: See *Smith on Mercantile Law*, 10th ed., Introduction; 2 *Selden Soc. Pub.*, 132 et seq.; *Gundermann, Eng. Privatrechts*, 84. Our law of negotiable paper has no orthodox sanction of having been accepted *semper ubique et ab omnibus*. Like the rest of our law, it has had a strictly European origin and history, which are tolerably well known: See *Brunner, Forschungen*, 524, 631; 1 *Heusler, Inst. des Deutsch. Privatrechts* 212, 213, 375; 9 *Law Quarterly Review*, 70. It is not to be presumed that either the Roman or Frankish law shaped the native law of Turkey. Still less is it to be presumed that Massachusetts modes of dealing with details prevail there when they notoriously vary even in European countries. In Spain, if we may trust *Horne v. Rouquette*, 3 Q. B. Div. 514, no notice of dishonor is necessary in order to enable the holder to have recourse to an indorser.

There is no need to multiply illustrations. If, as would seem from some of the text-books and encyclopedias, the European law of negotiable paper is known in Turkey, it is by recent legislative adoption or imitation of the French Code de Commerce, and the fact ought to be proved by the party who wishes to profit by it. Whether protest is necessary upon such an instrument as the draft in this case, and even whether an

³³² acceptance of it would be recognized as valid under the supposed Turkish code, is to be settled not by presumption, but by proof.

Exceptions overruled.

FOREIGN LAW—PRESUMPTIONS.—A foreign law is a matter of fact which the courts of this country cannot be presumed to be acquainted with or to have judicial knowledge of: *Wickersham v. Johnston*, 104 Cal. 407, 43 Am. St. Rep. 118. Presumptions as to foreign laws are generally confined to those states and countries in which the common law is the law of the land: *St. Sure v. Lindsfelt*, 82 Wis. 346, 33 Am. St. Rep. 50.

HOUGHTON v. RICE.

[174 MASSACHUSETTS, 366.]

ALIENATION OF AFFECTIONS—ACTION BY WIFE FOR. At common law, an action for the alienation of the affections alone cannot be maintained either by the husband or the wife. The alienation of the affections is merely a matter of aggravation of damages; and a complaint by a wife which charges no adultery, no procuring and enticing, or no harboring and secreting, does not state a cause of action.

R. E. Joslin and S. K. Hamilton, for the defendant.

C. F. Chamberlayne and W. M. Prest, for the plaintiff.

³⁶⁷ LATHROP, J. We do not think that the declaration in this case sets forth any cause of action at common law, if the action were by the husband against another man; and no statute of this commonwealth gives the wife any greater right than the husband in cases of this nature. The acts charged are that the defendant did "ingratiate herself into the affections of the said Willard Houghton [the plaintiff's husband]; cause him incessantly to frequent her society; to give her various large sums of money; to execute to her various conveyances of property; to make large expenditures of money on her behalf; and to transfer to her, the said defendant, the courtesy and generosity, love and affection, previously bestowed by him upon the plaintiff as his said wife." It is then charged that by reason of these unlawful acts her husband ceased to have regard, respect, or affection for the plaintiff, and became cross, irritable, ill-tempered, and penurious toward her, denying her suitable support and maintenance; was guilty of cruel and abusive

treatment toward her; that his affections for her were wholly alienated from her, and her home and married state broken up and destroyed; that her husband, while living during certain months under the same roof with her, separated himself "virtually" from her, refused to live or cohabit with her as husband and wife, or to give her ~~see~~ the benefit of his society, or to perform any of the duties due from him as her husband; but on the contrary, for part of the year openly, and during the rest of the year secretly, lavished his property, society, love, and affection upon the defendant. It is further alleged that "by reason of the matters and things hereinbefore set forth" the plaintiff has suffered great pain and distress of mind and body, has lost her home, and the society and comfort of her husband, etc.

No adultery is alleged, and therefore the action is not for criminal conversation, where the allegation when a husband sues is that the defendant debauched and carnally knew the plaintiff's wife. The alienation of the wife's affection in such a case is a mere matter of aggravation, and the loss of the wife's consortium is the actionable consequence of the injury. Adultery was the essential fact to be proved, and if this was not proved the action failed.

At common law, also, a husband could maintain an action against one who "persuaded, procured, and enticed his wife to continue absent and apart from him, and to secrete, hide, and conceal herself from him, whereby during the time she continued absent he lost her comfort and society, and her aid and assistance in his domestic affairs": *Lellis v. Lambert*, 24 Ont. App. 653, 654. He could also maintain an action against one for receiving his wife and unlawfully harboring, concealing, and secreting her from him, and refusing to deliver her to him. In such cases adultery need not be alleged.

We do not see anything in the substantive allegations which brings the case within any form of action known to the common law. The case in this respect is like that of *Lellis v. Lambert*, 24 Ont. App. 653, 654, a case very similar to this, and where the whole subject matter was ably considered by the court of appeals, the judges delivering their opinions seriatim. Judge Osler, on page 664, said: "The loss of a wife's affections not brought about by some act on the defendant's part which necessarily caused or involved the loss of her consortium, never gave a cause of action to the husband. His wife might permit an admirer to pay her attentions, frequent her society, visit at

her home, spend his money upon her, and by such means alienate her affections from him, resulting even in her refusal to live ³⁶⁶ with him, and, so far as she could bring it about, in the breaking up of his home, and yet, there being no adultery and no 'procuring and enticing' or 'harboring and secreting' of the wife, no action lay at the suit of the husband against the man. A wife can be in no better position to maintain an action against a woman guilty of similar conduct toward her husband."

In the case before us we are of opinion that the substantive allegations of the declaration do not state a cause of action, and that the demurrer should be sustained: See *Evans v. O'Connor*, 174 Mass. 287, ante, p. 316; *Neville v. Gile*, 174 Mass. 305.

So ordered.

A SIMILAR RULE was laid down in *Neville v. Gile*, 174 Mass. 305, the court declining to pass upon the question whether in any case a woman could maintain an action against another woman for the loss of consortium occasioned by her husband's leaving her. The court further says that in actions for unlawfully enticing away or harboring a man's wife, or for criminal conversation, it is necessary to allege loss of consortium.

ALIENATION OF AFFECTIONS.—A WIFE may maintain an action for the alienation of her husband's affections: *Beach v. Brown*, 20 Wash. 266, 72 Am. St. Rep. 98. See, on this subject, the extended note to *Clow v. Chapman*, 46 Am. St. Rep. 472-479.

COMMONWEALTH v. MURPHY.

[174 MASSACHUSETTS, 369.]

CRIMINAL LAW—FORMER JEOPARDY—RESENTENCE.
A person, who has been sentenced by a court having jurisdiction of the offense and of the person, and who has served a substantial portion of the time for which he was sentenced, can be resentenced if, on appeal by him, it is determined that the original sentence was unlawful; and such resentence does not put the defendant in jeopardy twice, or constitute a second punishment for the same offense.

E. F. McClennen, for the defendant.

A. W. De Goosh, assistant attorney general, for the commonwealth.

³⁶⁶ MORTON, J. The defendant in this case was the plaintiff in error in the case of *Murphy v. Commonwealth*, 173 Mass. 264, 70 Am. St. Rep. 266. In ³⁷⁰ that case it was held

that the statute under which he was sentenced was unconstitutional so far as it related to past offenses, and the sentence which had been imposed was reversed and the case remanded to the superior court, under the Public Statutes, chapter 187, section 13, for sentence according to the law as it was when the offense was committed and before the statute under which he was sentenced took effect. The defendant was brought before the superior court on January 7, 1899, pursuant to that decision, and resentenced, the sentence being to the state prison for nine years, ten months and twenty-nine days, the first day solitary and the rest at hard labor. Under the previous sentence he had been sentenced to the state prison for not less than ten nor more than fifteen years, the first day to be in solitary confinement. When he was resentenced he had served the solitary confinement, and two years seven months and ten days under the original sentence. Prior to imposing the last sentence the court said that as the defendant had already served the term of solitary confinement he would prefer not to resentence him to solitary confinement if a written waiver thereof was filed by the defendant's attorney. The attorney stated that he did not feel justified in filing such waiver, and thereupon sentence was imposed as aforesaid. The defendant duly excepted to the imposition of the last sentence, and requested that all his rights might be reserved, which was done.

The contention of the defendant is in substance that one who has been sentenced by a court having jurisdiction of the offense, and of the person and the right to sentence to the place designated, and who has served a substantial portion of the time for which he was sentenced, cannot be resentenced if it turns out on a writ of error brought by him that the original sentence was unlawful. He contends in his own case that the resentence constituted a second punishment for the same offense, that he has been twice put in jeopardy thereby, and has been deprived of his constitutional rights.

The statute under which the case was remanded contains no limitation on the power to remand for sentence in case of a reversal for error, but it is manifest that it cannot authorize the imposition of another sentence under such circumstances as would make it an interference with the constitutional rights ³⁷¹ of the prisoner. The question then is, Was the effect of the last sentence to put the defendant in jeopardy twice, or to punish him again for the same offense, or to abridge his privileges and immunities as a citizen of the United States?

By jeopardy is meant, we think, lawful jeopardy from the commencement of the proceedings until their termination by a proper judgment and sentence, or acquittal, or what the law regards as such. It has been held in numerous cases that where, either for want of jurisdiction or from some defect in the indictment, or from some error in the course of the proceedings, the verdict has been set aside or the judgment has been arrested on a writ of error brought by the defendant, or on a motion made by him, and he has been tried again, he was not thereby put in jeopardy a second time, and his constitutional rights were not abridged: *Commonwealth v. Wheeler*, 2 Mass. 172; *Commonwealth v. Peters*, 12 Met. 387; *Commonwealth v. Roby*, 12 Pick. 496, 502; *Commonwealth v. Lahy*, 8 Gray, 459; *Commonwealth v. Gould*, 12 Gray, 171; *McKee v. People*, 32 N. Y. 239; *People v. McKay*, 18 Johns. 212; *State v. Walters*, 16 La. Ann. 400; *Jones v. State*, 15 Ark. 261; *Turner v. State*, 40 Ala. 21; *Gerard v. People*, 4 Ill. 362; *State v. Redman*, 17 Iowa, 329; *State v. Sutton*, 4 Gill, 494; *Cooley's Constitutional Limitations*, 3d ed., 327; *Sedgwick on Statutory and Constitutional Law*, 2d ed., 572, 573, note a. One ground on which such a conclusion has been reached is, that by bringing the writ of error or making the motion he is deemed to have waived any constitutional objection that he might have had to another trial or to the entry of a proper judgment: 1 *Bishop's Criminal Law*, 2d ed., secs. 672 et seq. If a second trial where the verdict has been set aside or the judgment arrested does not constitute legal jeopardy, it is difficult to see how the fact that a party may have served a portion of the sentence that has been set aside for error on proceedings instituted by him can rightfully object to the imposition of another and a lawful sentence by the court to which the case has been remanded. In this case the trial and conviction were, for aught that appears, regular and legal in all respects. The only error was in the sentence. It would be strange if there was no power anywhere to correct or to authorize the correction of the error on proceedings instituted by the prisoner except at the risk of delivering him from any further ³⁷² punishment for the offense of which he had been convicted. It is said in *McKee v. People*, 32 N. Y. 239, 245, where the case was remanded under a statute similar to ours, that the term "jeopardy" has no relation to the reversal of the erroneous judgment and pronouncing a legal one, pursuant to a legal conviction." And in *Jeffries v. State*, 40 Ala. 381, it was held that a prisoner could not plead autrefois

convict, if the former conviction had been reversed on proceedings instituted by himself, notwithstanding he had served a part of the term of his imprisonment before the reversal: See, also, *Jones v. State*, 15 Ark. 261. In criminal proceedings the sentence is the judgment or at least an essential part of it.

Though the sentence in this case was in excess of the jurisdiction, it was not void, but voidable (*Sennott's Case*, 146 Mass. 489, 4 Am. St. Rep. 344; *Ex parte Lange*, 18 Wall. 163, 174), and if the defendant had completed the term for which he was sentenced he would have paid the penalty required and could not have been imprisoned or punished again for the same offense: *Commonwealth v. Loud*, 3 Met. 328, 37 Am. Dec. 139. To that extent the sentence was lawful until reversed: *Sennott's Case*, 146 Mass. 489, 4 Am. St. Rep. 344; *Regina v. Drury*, 3 Car. & K. 193. Except for the statute authorizing the case to be remanded, he would have been entitled to a discharge, not because to resentence him was unconstitutional, but because at common law the court from which the writ of error issued could not itself pronounce the proper judgment or sentence or send back the case to the inferior court to do so: *Shepherd v. Commonwealth*, 2 Met. 419; *The King v. Bourne*, 7 Ad. & E. 58; *The King v. Ellis*, 5 Barn. & C. 395. But a judgment and sentence reversed are the same as if there had been no judgment and sentence (*Regina v. Drury*, 3 Car. & K. 193), and this must be so even if the prisoner has served a part of the sentence. Whether the confinement under the reversed sentence has been longer or shorter can, on principle, make no difference. Besides, the length of such confinement will depend somewhat at least on the promptness with which proceedings are instituted to secure a reversal. No doubt it would have been competent for the court to order that the last sentence should take effect from the date of the first sentence (*Jacquins v. Commonwealth*, 9 Cush. 279), but we do not think that it was bound to do so; and though the effect of the resentence ³⁷³ will be to compel the defendant to suffer solitary confinement twice, and will result, it is said, in his actual confinement for a longer period than the term for which he was originally sentenced, we do not see, for reasons already given, that the last sentence is rendered invalid thereby. The case is not one of the imposition of a second sentence for the same offense, or of the attempted correction of a sentence after the term has ended at which it was imposed and the court has adjourned without day: See *Commonwealth v. Foster*, 122 Mass.

317, 323, 23 Am. Rep. 326. But it is a case where the sentence that was originally imposed has been reversed and declared unlawful upon a writ of error brought by the party aggrieved, and the case has been remanded as provided by statute to the superior court for sentence according to the law as it was when the offense was committed. Cases in regard to the imposition of a second sentence as such, or in regard to the attempted correction of a sentence after the adjournment of the court or the substitution of one sentence for another, do not apply. The defendant relies upon *Ex parte Lange*, 18 Wall. 163, and *Feeley's Case*, 12 Cush. 598. In *Ex parte Lange*, 18 Wall. 163, the statute authorized fine or imprisonment, but the court imposed both. The prisoner paid the fine, and after it had been paid, the court at the same term attempted to modify the sentence by changing it to imprisonment and substituting the sentence as thus modified for the original sentence of fine and imprisonment. But the supreme court held that the prisoner having satisfied one of the alternative penalties provided by the statute, the sentence could not be changed and the other alternative penalty imposed. Manifestly, that case is not like this. *Feeley's Case*, 12 Cush. 598, was much the same. The statute provided fine or imprisonment. The court imposed both, and the prisoner paid the fine and was committed pursuant to the other part of the sentence, and then petitioned for a writ of habeas corpus on the ground that he was unlawfully restrained of his liberty. This court granted the writ and ordered his discharge, on the ground that he had paid the fine and the court below had no power to impose imprisonment. It is manifest that this case also does not help the defendant. The course that was followed in *Murphy v. Commonwealth*, 172 Mass. 264, 70 Am. St. Rep. 266, seems to have been followed in the supreme court of the United States, and apparently was not ³⁷⁴ regarded as putting the prisoner in jeopardy or punishing him twice, or as interfering with his constitutional rights: *Coleman v. Tennessee*, 97 U. S. 509, 519; *Reynolds v. United States*, 98 U. S. 145, 168, note; *In re Bonner*, 151 U. S. 242, 262.

We do not discover in what has been done anything by which the privileges or immunities of the defendant as a citizen of the United States have been abridged in violation of the fourteenth amendment. The equal protection of the laws has not been denied to him, and he has not been deprived of his liberty without due process of law: *In re Converse*, 137 U. S. 624; *Moore v. Missouri*, 159 U. S. 673.

The fact that the court in *Murphy v. Commonwealth*, 172 Mass. 264, 70 Am. St. Rep. 266, may have taken a somewhat different view of the Statutes of 1895, chapter 504, from that taken in *Commonwealth v. Brown*, 167 Mass. 144, does not constitute an interference with the defendant's rights.

Exceptions overruled.

FORMER JEOPARDY.—A person is not put in jeopardy twice for the same offense until both the facts and the law applicable to the facts are finally determined. Putting in jeopardy means a jeopardy which is real and has extended through every stage of one prosecution; and while such prosecution remains, as when an appeal is taken by the state, the one jeopardy has not been exhausted: *State v. Lee*, 65 Conn. 265, 48 Am. St. Rep. 202, and see extended note thereto; also, *McDonald v. State*, 79 Wis. 651, 24 Am. St. Rep. 740, and note; *State v. Kessler*, 15 Utah, 142, 62 Am. St. Rep. 911.

SANFORD v. ORIENT INSURANCE COMPANY.

[174 MASSACHUSETTS, 416.]

INSURANCE — ORAL CONTRACT — STATUTE OF FRAUDS.—A contract to insure is not within the statute of frauds, since it may be completely performed within a year upon the happening of a contingency.

INSURANCE—POWER OF COMPANY TO CONTRACT.—An insurance company having power generally to "make insurance against loss by fire" may make a preliminary contract to insure property to be consummated by a subsequent execution and delivery of a policy, and the language in its charter describing the manner in which a policy should be executed does not restrain this general power.

INSURANCE—POWER OF GENERAL AGENT.—A person who for years has been held out as the general agent of an insurance company, with full power to negotiate contracts of insurance, is authorized to make a preliminary contract of insurance to be consummated by a subsequent filling up and delivering of a policy.

INSURANCE—INSURABLE INTEREST.—THE POSSESSION of property claiming title under a deed is sufficient evidence of ownership to give a person an insurable interest in the property.

INSURANCE — CONTRACT — EVIDENCE. — CONVERSATIONS with an insurance agent at the time of the contract are admissible to show what the contract was, in an action for a breach of the contract.

INSURANCE—AUTHORITY OF AGENT—EVIDENCE.—The fact that an insurance agent did not submit his risks to the company for its approval before he wrote and delivered the policy is admissible in evidence to show the nature of the agent's authority.

INSURANCE—INSTRUCTIONS TO AGENT—EVIDENCE.—Private instructions given by an insurance company to its agent, not communicated, and unknown, to the insured, are inadmissible

in evidence in an action against the company for a breach of its contract of insurance.

Contract action. The first count alleged that the defendant, through its agent, agreed to renew certain insurance upon the same terms as were contained in the original policy, and to issue a new policy in accordance with such contract, but that it wrongfully neglected to issue the policy. The second count alleged that the defendant agreed to insure the plaintiff's dwelling-house, but wrongfully neglected to issue the policy. The fourth count alleged that the defendant insured the plaintiff's dwelling-house, and agreed to issue a policy in accordance with the contract, but that it had refused to issue such policy and retained and concealed the same. The premium was paid, and the contract to insure was effected before the expiration of the first policy.

W. H. Brooks and W. Hamilton, for the defendant.

H. M. Coney, for the plaintiff.

419 HAMMOND, J. The evidence for the plaintiff, if believed, would warrant a finding that a few days before the expiration of the original policy the plaintiff and Metcalf, assuming to act as the agent of the defendant, made an oral agreement by which the defendant was to renew the insurance upon the same terms as before, for three years from the expiration of the said policy; that within a reasonable time after such expiration a new one, embodying the agreement, should be issued to the plaintiff, payable in case of loss to Campbell, the mortgagee, as his interest might appear; and that meanwhile the property should be covered by the defendant. The jury might further find that at the time of the agreement the plaintiff paid the premium, and that Metcalf was to send the policy to Campbell, and that no policy was ever made out. The plaintiff did not claim that he made any other contract than this providing for insurance after the expiration of the original policy.

It is a little difficult to understand precisely whether this action, as stated in the first two counts as originally drawn, which, as amended, are the only counts upon which the case was submitted to the jury, is upon an oral contract of insurance or upon a breach of a contract to issue a written policy of insurance; or, in other words, whether the claim of the plaintiff is that at the time of the fire his property was insured, or

that the defendant had agreed to insure it and failed to do so, so that he has lost the benefit of insurance.

Perhaps, so far as concerns the rule of damages, as to which no exception arises, the question is immaterial; but when we come to examine into the nature of the power of the agent it may become material, for it is manifest that there is a difference between the power to make an agreement to issue a policy of insurance within a reasonable time, and meanwhile to keep the ⁴²⁰ property insured, and the power to make an oral contract of insurance extending as such over a period of years.

The presiding justice, however, at the trial, seems to have understood that the claim of the plaintiff as expressed in these two counts was that "there was an oral agreement to make such an instrument, to make a policy of insurance, and that agreement was not carried out," and, on the whole, we think the counts as amended will bear that interpretation.

The action, then, is not based upon the theory that at the time of the fire the property was insured, but that the agreement to insure it had "not been carried out," or, in other words, it is for the breach of the contract to insure.

It is settled that a contract like this need not be in writing (*Sanborn v. Fireman's Ins. Co.*, 16 Gray, 448, 77 Am. Dec. 419; *Emery v. Boston Marine Ins. Co.*, 138 Mass. 398); and, since it may be completely performed within a year upon the happening of a contingency, it is not within the statute of frauds: *Browne on Statute of Frauds*, sec. 275; *May on Insurance*, 3d ed., sec. 23, C, and cases there cited; *Franklin Ins. Co. v. Colt*, 20 Wall. 560.

It was also within the corporate powers of the defendant, as expressed in its charter. The defendant was authorized generally to "make insurance against loss by fire," and the language describing the manner in which a policy should be executed is to be regarded as consisting simply of enabling words not restraining the general power to make contracts of which the policies are the evidence, especially when applied to a preliminary contract like this: *Sanborn v. Fireman's Ins. Co.*, 16 Gray, 448, 77 Am. Dec. 419; *Brown v. Franklin Ins. Co.*, 165 Mass. 565, 52 Am. St. Rep. 535; *May on Insurance*, 3d ed., sec. 23, D. The contract, therefore, was such as the defendant had the power to make. The defendant however, contends that Metcalf was not authorized to make the contract on its behalf. In considering ⁴²¹ this contention it is to be borne in mind that the contract did not contemplate that the evidence of it

should be entirely oral during its continuance. On the contrary, it was expressly agreed that a new policy should be made out and delivered to the mortgagee, and that only during the interval between the expiration of the old policy and the time for the delivery of the new one should the property be covered under the oral agreement. In other words, it was only a preliminary agreement preceding the stipulated delivery of the policy, which, after such delivery, was to be the permanent evidence of the contract.

It appears by the written power of attorney given by the defendant to Metcalf that he was appointed the "agent" of the company, and was "authorized to issue the policies and renewal receipts furnished by" it and "countersigned by him as agent, and to do such other business as they shall in writing instruct and authorize said agent to do, or as is permitted by the printed instructions to agents furnished him by" the company.

It further appears by the testimony of Metcalf that he had been engaged in the insurance business for about twenty years, and that he had been the agent of the defendant in Ware ever since the date of his commission in March, 1877, and as such had done business for it to a considerable amount; that, as its agent, he had surveyed, examined, and solicited risks, fixed the rates as regulated by a board of underwriters, issued policies properly signed by the president and secretary and countersigned by him, had written the policies and received the premiums; and that he was in the habit of doing all this without first submitting the risks to the company.

This method of transacting business had existed for years with the sanction of the defendant, and it must therefore be considered as holding out Metcalf as its agent to do all such things. He was held out as a general agent to negotiate contracts of insurance, agree upon the rate of premium, the term of insurance and all the terms of the contract, and for that purpose he was furnished with policies executed in blank by the president and secretary, with authority to fill up and deliver the same to any person with whom he made a contract. This authorized him to make a preliminary contract binding ~~upon~~ upon the defendant, to be consummated by filling up and delivering a policy pursuant thereto. In other words, he was authorized to make a valid preliminary contract like the one in suit, and this is so whether or not he was authorized to make a simple oral contract not contemplating the issue of a policy.

To hold otherwise, and to require the written policy which is only the permanent evidence of the contract to be issued immediately upon the presentation of the application for insurance, would so seriously cripple and hamper an agent having the general authority possessed by Metcalf as to be manifestly inconsistent with the proper exercise of his authority, and without doubt would be contrary to the general method in which the insurance business is transacted: *May on Insurance*, 3d ed., sec. 129; *Ellis v. Albany City Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495; *Angell v. Hartford Ins. Co.*, 59 N. Y. 171, 17 Am. Rep. 322; *Franklin Ins. Co. v. Colt*, 20 Wall. 560.

Upon the undisputed facts the court correctly ruled that Metcalf had authority as the agent of the defendant to make the agreement. The defendant not having issued the written policy within a reasonable time has committed a breach, and is liable in damages. As the action is not upon the policy, but upon the breach of the contract to deliver it, the provisions which were to be inserted in the policy as to the mortgagees and as to arbitration are not applicable. No question arises as to the rule of damages. The several exceptions as to the admission and rejection of evidence remain to be considered.

The only objection to the admission of the deed to the plaintiff was that it was not properly acknowledged. As between the parties to this suit it was not necessary that it should be acknowledged at all. The plaintiff claiming title under it was in possession of the property, and that was sufficient evidence of ownership to give him an insurable interest. The conversations with Metcalf at the time of the contract were admissible to show what the contract was, and it was within the discretion of the court to admit them before proof of the agency of Metcalf.

⁴²³ As to the subsequent conversations between the plaintiff and the agent, we see nothing prejudicial to the defendant. The admission of the proof of loss went no further, except as to the amount of loss, than the admission of the defendant, that it had been received. Although the case was finally submitted to the jury upon only the first two counts of the declaration, yet it does not appear from the bill of exceptions but that the plaintiff at the time the paper was admitted was intending to rely upon the fourth count; and it was admissible upon that count.

The fact that Metcalf did not submit his risks to the defendant for their approval before he wrote and delivered the poli-

cies had a direct bearing on the nature of his authority, and was admissible. The private instructions given by the defendant to Metcalf, not having been communicated or known to the plaintiff, were inadmissible so far as they were inconsistent with his apparent general authority, and in all other respects were immaterial and were properly excluded.

Campbell, the mortgagee, was interested in this contract of insurance because the policy was to be made payable to him in case of loss as his interest might appear, and he was intending, if necessary, to keep it insured himself and to pay the insurance. The conversations between him and Metcalf were upon that subject, and therefore admissible as statements made by the agent in the transaction of the business.

Exceptions overruled.

INSURANCE—ORAL CONTRACT.—As the statute of frauds does not apply to insurance, an agreement to insure need not be in writing: *Croft v. Hanover Ins. Co.* 40 W. Va. 508, 52 Am. St. Rep. 902; *Brown v. Franklin Ins. Co.*, 165 Mass. 565, 52 Am. St. Rep. 534.

INSURANCE—INSURABLE INTEREST.—One in possession of real property under a contract of purchase is to be deemed the owner for purposes of insurance: *Baker v. State Ins. Co.*, 31 Or. 41, 65 Am. St. Rep. 807.

INSURANCE.—THE AUTHORITY OF AN AGENT of an insurance company to negotiate and conclude all the terms of the contract, and to consummate it by filling up and countersigning the policy, necessarily includes the power to make a preliminary contract for the issuing of a policy: *Ellis v. Albany Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495.

INSURANCE—INSTRUCTIONS TO AGENTS.—Special instructions limiting the authority of a general agent, whose powers otherwise would be coextensive with the business intrusted to him, must be communicated to the party with whom he deals, or the principal is bound to the same extent as though such instructions were not given: *Wilson v. Commercial Union Assur. Co.*, 51 S. C. 540, 64 Am. St. Rep. 700, and note.

ROBINSKA v. MILLS.

[174 MASSACHUSETTS, 432.]

MASTER AND SERVANT—WARNING OF DANGER—DANGEROUS MACHINERY.—A servant of mature years, who is employed in a mill in connection with machinery which is in perfect working condition, and the dangers of which can be ascertained by inspection, is not entitled to be warned of the danger incident to the operation of such machinery, notwithstanding she could not speak English and had no other knowledge of machinery than what she had gained in the few days in the mill.

W. Hamilton and W. H. Brooks, for the defendant.

A. L. Green, for the plaintiff.

⁴³² **HOLMES, C. J.** This is an action for personal injuries suffered by the plaintiff while, as she alleges, in the defendant's employ. The plaintiff had got leave to come into the defendant's mill in order to learn how to work. She was not paid, but we shall assume for the purposes of decision that she rendered enough services to the defendant to warrant the inference that she had the rights of a regular employé. She had come recently from Warsaw, did not speak English, and had no other knowledge of machinery than what she had got in the few days during which she had been learning. The machine upon which she was hurt was a machine for cleaning cotton. She was told to clean the back of it, and had a brush for the purpose. It is enough to say that some way in from the back of the machine there was a cylinder covered with needles, revolving away from the plaintiff and near to the edge of what was called a nipper plate above ⁴³³ and parallel to it. The nipper plate rose and fell to within about one sixty-fourth of an inch from the cylinder. The greater part of this cylinder and the whole of two others below it and nearer to the plaintiff were concealed by a cover, so that only the top of this cylinder could be seen. The plaintiff said that she did not see that, and did not know that the cylinder had needles on it or was in motion. The machine was going, however, and making a good deal of noise. According to the plaintiff's account there was cotton lint in this place which would not come off when she brushed, and so she put in her fingers and got caught. She seeks to recover on the ground that she should have been warned of the danger.

It seems to us that the plaintiff sets the defendant's duty too high. There is no suggestion that the machinery was im-

proper, and there are limits to the obligation of an employer to point out the dangers of proper machinery. The obligation is imposed mainly for the sake of the young who have not the experience or power to look out for themselves which are to be expected in adults, or, in the case of adults, where there are concealed defects. The plaintiff was mature, and the fact that she did not speak our language gave her no special rights. The defendant was entitled to assume that she knew the danger of such a combination as we have described (*Lowcock v. Franklin Paper Co.*, 169 Mass. 313); and although she says that she did not know that it was there, she could have seen it if she had looked with any care. If she saw fit to put her hand into the recesses of a going machine without knowing what she would meet, she cannot hold other people answerable for the consequences. The defendant was not bound to anticipate and warn against such conduct. In *De Costa v. Hargraves Mills*, 170 Mass. 375, the plaintiff was told to remove clogs from a machine which was in motion. An experienced man could do it while the machine was in motion, and the picker boss did so in the plaintiff's presence, so that there was color for the argument that the plaintiff was directed to do what he did. If he was directed to do it, then, as the danger was more or less hidden, it was possible to contend that he had been led into a trap. But there are no such circumstances here: See *Ford v. Mount Tom Sulphite Pulp Co.*, 172 Mass. 544, 545.

Exceptions sustained.

A MASTER'S FAILURE TO WARN A SERVANT of patent dangers does not render him liable for resulting injuries: *Moore Lime Co. v. Richardson*, 95 Va. 328, 64 Am. St. Rep. 785, and note.

SULLIVAN v. METROPOLITAN LIFE INSURANCE CO.

[174 MASSACHUSETTS, 467.]

LIFE INSURANCE — BENEFICIARY — RECOVERY OF PREMIUMS PAID.—The beneficiary of a life insurance policy, who is not in privity with the insurance company, had paid none of the premiums, and was without knowledge of the existence of the policy, cannot recover the premiums which have been paid, even though the policy was void and never attached.

J. L. Doherty and D. E. Leary, for the plaintiff.

J. B. Carroll and W. H. McClintock, for the defendant.

⁴⁶⁸ LATHROP, J. The bill of exceptions states that the plaintiff was named as beneficiary in an application for insurance upon the life of her father, Timothy Sullivan, for the sum of five hundred dollars. It also states that the policy is dated May 2, 1887, and that premiums, to the amount of five hundred and sixty-five dollars, were paid to the defendant on account of the insurance, when payment ceased, and this action was brought to recover back that amount less ten dollars received as a dividend. The date of the writ is June 15, 1898.

The ground upon which the plaintiff seeks to recover the premiums is that the policy was void and never attached, on account of the failure to comply, in making the application, with certain rules of the company, which required that the person insured should have knowledge of the insurance, and should sign the application on the back thereof, and should be examined by a physician.

The difficulty with the plaintiff's case is that there was no privity between her and the defendant; and the case she relies upon of *Fisher v. Metropolitan Ins. Co.*, 160 Mass. 386, 39 Am. St. Rep. 495, and 162 Mass. 236, does not apply. One McCann caused the insurance to be effected without the knowledge of the plaintiff or her father, and paid all the premiums which were paid. There is no evidence that the plaintiff paid any premium, or that McCann, in paying them, acted as the agent of the plaintiff. Under these circumstances we see no ground upon which this action can be maintained.

Exceptions overruled.

INSURANCE—RECOVERY OF PREMIUMS PAID.—If one having no insurable interest in the life of another pays the premiums on a policy purporting to be issued on the life of the latter, in the mistaken belief that the policy was valid, he may recover from the insurer the premiums so paid: *Hogben v. Metropolitan Ins. Co.*, 69 Conn. 503, 61 Am. St. Rep. 53. See, too, *McDonald v. Metropolitan Ins. Co.*, 68 N. H. 4, 73 Am. St. Rep. 543.

BEALS v. MAYHER.

[174 MASSACHUSETTS, 470.]

INSOLVENCY—RIGHT OF HOLDER OF PROMISSORY NOTE MADE BY INSOLVENT—LIABILITY OF MAKER AND INDORSER.—The holder of a note, on which the indorser's liability has become absolute, has the right to prove the full amount against estates in bankruptcy of both maker and indorser, provided no payment from either had been received before proof made; and after such proof the receipt of dividends from one estate does not cut down the holder's right to receive dividends on the whole amount proved against the other estate.

ASSIGNMENT FOR BENEFIT OF CREDITORS—PROOF AGAINST ESTATE—LIABILITY ON NOTE—RIGHTS OF INDORSER.—Where the maker of a note has made an assignment for the benefit of creditors, a holder of such note may make proof of the entire debt against the assignor's estate, without deducting a partial payment made by the indorser, and the indorser has no right by reason of the partial payment to prove the amount thereof against the estate of the maker.

W. G. Bassett, for the claimants.

A. L. Green, for the plaintiff.

⁴⁷¹ LORING, J. Prior to May 12, 1897, the Haydenville Manufacturing Company was indebted to the First National Bank of Northampton, to the First National Bank of Easthampton, and to the First National Bank of Westfield, on certain promissory notes signed by it and indorsed by the plaintiff for its accommodation. On that day the manufacturing company made an assignment to the defendants Mayher and Robinson for the benefit of its creditors. On December 12, 1897, the three banks received from the plaintiff thirty per cent of the amount due on the notes, and released the plaintiff from his liability as indorser. The plaintiff had previously been adjudicated an insolvent debtor, but upon these payments being made and the releases mentioned above being given the insolvency proceedings were stayed. The plaintiff contended that he was a creditor of the manufacturing company for the several sums so paid by him, and was entitled to share as such in the assets in the hands of the assignees; and further, that the banks could share in those assets only for the balance of the notes left after deducting the sums paid by him. The assignees refused to recognize the plaintiff as a creditor entitled to share in the estate, and this bill was brought before any dividend had been declared or paid by the assignees, to enforce the trusts set forth in the assignment and the plaintiff's con-

tention as to his rights and those of the banks to share in the assets. The three banks were made parties defendant; they appeared and set up that they were creditors to the full amount of the notes, and that the plaintiff was not entitled to prove as a ⁴⁷² creditor at all. The superior court ruled that the plaintiff was entitled to stand as a creditor for the sums paid by him, and the banks could only share in the assets for the balance of the notes after deducting those sums.

The terms of the assignment by the manufacturing company were as follows: "And then to pay and discharge in full, if the residue of said proceeds is sufficient for that purpose, all the debts and liabilities now due or to grow due from the Haydenville Manufacturing Company, with all interest money due or to grow due thereon." There is no provision for any assent by the creditors to the assignment, for any discharge of the assignor, or for any notice to the creditors.

The notes held by the Westfield bank "were duly proved by the said bank before the assignees before the plaintiff brought his suit and before he paid his money to the said banks or any of them," but the notes of the other banks were not so proved.

It is settled in this commonwealth, in England, and generally in America, that the holder of a note, on which the indorser's liability has become absolute, has the right to prove the full amount against the estates in bankruptcy of both maker and indorser, provided no payment from either had been received before proof made; and it is settled that after such proof the receipt of dividends from one estate does not cut down the holder's right to receive dividends on the whole amount proved against the other estate; and, further, it is immaterial whether the subsequent payment is received from the maker after proof made against the indorser or vice versa; for, in the words of Lord Hardwicke in *Ex parte Wildman*, 1 Atk. 109, 110, to cut down the dividends due on the proof made "would be taking away from a man the double security he had, and which he may make use of in law and equity, till he is satisfied his whole debt": *National Mount Wollaston Bank v. Porter*, 123 Mass. 308, 309; *Ex parte Turquand*, 3 Ch. Div. 445; *In re Ellerhorst*, 5 Nat. Bank. Reg. 144, Fed. Cas. No. 4,381; *In re Weeks*, 8 Ben. 265; 13 Nat. Bank. Reg. 263.

When, however, the holder has received a partial payment before making proof, the authorities in America and England do not altogether agree as to what the rights of the several parties are. It is settled in both countries that if the holder has

received a payment from the maker before he proves against the ⁴⁷³ indorser, he can prove for the balance of the note only: *Sohier v. Loring*, 6 Cush. 537. The cases on this and the preceding point are collected in *Ames on Suretyship*, 419, note.

In America it is held by the great preponderance of authority that a payment received from an indorser need not be deducted in making proof against the bankrupt estate of the maker: *Ex parte Talcott*, 2 Low. 320; *Ex parte Harris*, 2 Low. 568; *Downing v. Traders' Bank*, 2 Dill. 136; *In re Ellerhorst*, 5 Nat. Bank. Reg. 144-147, Fed. Cas. No. 4,381; *In re Baxter*, 18 Nat. Bank. Reg. 497-499, Fed. Cas. No. 1,120; *In re Pulsifer*, 14 Fed. Rep. 247, 249.

But in England it is established that a partial payment received before proof must be deducted as well when the payment is received from the indorser and proof is made against the maker, as when proof is made against the indorser after a partial payment by the maker: *Ex parte Tayler*, 1 De Gex & J. 302; *In re Oriental Commercial Bank*, L. R. 6 Eq. 582. Where it is held that the note-holder can prove for the balance only, the indorser is allowed to prove against the estate of the maker the partial payment which he has made; this was admitted in *Ex parte Turquand*, 3 Ch. Div. 445: See *Ex parte Wood*, 10 Ves. 415; *In re Sterling*, 4 Hughes, 553. In America, the whole debt being proved by the note-holder, there is no room for any proof by the indorser who has made a partial payment; to allow proof by him as well as proof of the whole debt by the creditor would be to allow a double proof in respect of the same debt.

In the case at bar payment was made by the plaintiff after the date of the assignment, and his right to indemnity did not accrue until then: *Thayer v. Daniels*, 110 Mass. 345. But any difficulty by reason of the date when the plaintiff's claim accrued is obviated by the provision of the deed of assignment, by which debts and liabilities to grow due were secured, as well as those due when the assignment was made.

The rule of the United States courts in bankruptcy is founded upon the strict legal rights of the parties, and by it all the conflicting rights and equities which the parties severally have are secured to them, and we are of opinion that it must be adopted as the rule governing this assignment.

It was decided in *Jones v. Broadhurst*, 9 Com. B. 173, and has been settled to be the law of England for nearly half a century, ⁴⁷⁴ that a partial payment by an indorser is not an extinguish-

ment pro tanto as against the maker: *Agra & Masterman's Bank v. Leighton*, L. R. 2 Ex. 56; *Thornton v. Maynard*, L. R. 10 C. P. 695. *Jones v. Broadhurst*, 9 Com. B. 173, has been followed in New York: *Beran v. Tradesmen's Nat. Bank*, 137 N. Y. 450.

In this commonwealth the point has never been decided; in *North National Bank v. Hamlin*, 125 Mass. 506, 508, Mr. Justice Lord stated that such was the law. In *Granite Nat. Bank v. Fitch*, 145 Mass. 567, 1 Am. St. Rep. 484, this court held that a partial payment made by an indorser under an express agreement was not an extinguishment pro tanto, and left undecided the question where payment by an indorser is made without any agreement.

By the rule of the United States bankruptcy court the whole debt is proved by the note-holder against the estate of the maker. If the surety pays the note in full, as he has agreed to do, he becomes entitled to be subrogated to the proof. If the proof is made after a partial payment made by him, it is for his interest that the proof shall be allowed for the full amount; for if he pays the balance of the note, it is his right to be subrogated to the maker's proof, and it is for his interest that that proof should be a proof in full.

Until he has paid the balance and discharged his contract in full it is impossible to allow him to prove the partial payment in competition with the note-holder. So long as the indorser leaves unpaid any portion of the sum which he has guaranteed shall be paid and shall be paid in full, he has no right, by proving against the bankrupt estate of the debtor the partial payment made by him, to compete with the note-holder and so diminish the dividend which the note-holder will recover; this was the opinion of Lord Eldon in case of a partial payment made by a surety, though the law had been otherwise settled in England in *Ex parte Wood*, 10 Ves. 415: See *Ex parte Rushforth*, 10 Ves. 409, 417.

By allowing the note-holder to prove in full, the rights of the indorser are fully secured; for if the note-holder recovers in dividends from the estate of the maker such sum as, added to the partial payment made by the surety, gives him more than one hundred cents on the dollar, he will hold any surplus for the indorser.

⁴⁷⁵ Whether the Public Statutes, chapter 157, section 26 (Stats. 1838, c. 163, sec. 3; Gen. Stats., c. 118, sec. 25) is to be construed to be an adoption of the English rule or merely to authorize proof of a partial payment made by an indorser af-

ter publication of the warrant against the maker, in cases where it would have been provable had the payment been made before the publication of the warrant—that is to say, where the note-holder has failed to prove—need not now be considered. That statute does not govern this assignment.

In the case at bar the payment made by the plaintiff was plainly made in partial fulfillment of, and to obtain a full discharge from, the plaintiff's liability as indorser, and in no way on account of the manufacturing company so as to stand as a payment by it, and must be held not to be an extinguishment of the note pro tanto, but to leave the note unpaid in full as against the maker.

By its terms the assignment in the case at bar was made for the benefit of all the creditors of the manufacturing company, without reference to any proof made or assent given by them. It is not necessary to decide when, in case of such an assignment, the rights of a creditor to share in the estate attach, or whether proof of a claim is or is not necessary.

If the creditors are entitled to share without proof, the rights of all three banks attached before the payment by the plaintiff; and it is clearly established that the right of a creditor to share in dividends on the amount of its claim as established is not affected by a subsequent partial payment, no matter by whom made. If no right to share in the assets vested in any creditor until proof made, the Westfield bank's right to a dividend for the full amount is clearly made out by the proposition just stated, and the right of all three banks to a dividend on the full amount is made out by the rule which we have spoken of as the American rule, and which was adopted in *Ex parte Talcott*, 2 Low. 320.

We are, therefore, of opinion that the three banks had the right to participate in the estate for the full amount of the notes held by them, and without deducting the partial payment received from the plaintiff in discharge of his liability as indorser; and that the plaintiff had no right by reason of the partial payment made by him to prove the amount thereof in competition with the banks.

Exceptions sustained.

NEGOTIABLE INSTRUMENTS—INSOLVENCY.—If both the maker and indorser of a negotiable instrument become insolvent and assign their property for the benefit of creditors, the holder of such paper may prove the whole amount thereof against both parties at the same time, and receive from each estate the full pro

rata of that amount: *Citizens' Bank v. Kendrick etc. Co.*, 92 Tenn. 437, 36 Am. St. Rep. 96; and the right against one cannot be affected by any dividends received from the estate of the other, except that the dividends received from the two estates shall in no event exceed the amount of the note: *In re Meyer*, 78 Wis. 615, 23 Am. St. Rep. 435.

SMITH v. CONDON.

[174 MASSACHUSETTS, 550.]

JUDGMENT—ACTION ON—SATISFACTION BY LEVY.—In an action to recover a balance due on a judgment, evidence as to the value of goods previously levied upon is properly excluded, since the mere levy of an execution on personal property of sufficient value to satisfy the same does not operate as a satisfaction of the judgment.

Contract to recover a balance due upon a judgment. Execution was issued on the original judgment upon personal property of the defendant, but the execution was never returned. The property was taken from the defendant's premises by the officer, and the defendant testified that he afterward saw the entire property on the plaintiff's premises. To show the value of the property levied upon, the defendant was asked what its value was. The question was excluded. The defendant offered no further evidence, but requested the judge to order a verdict for the defendant. The judge refused and defendant excepted.

O. C. Milton, for the defendant.

J. E. Sullivan and D. F. O'Connell, for the plaintiffs.

⁵⁵¹ **LATHROP, J.** The only case in this commonwealth which the defendant cites in support of his contention is *Ladd v. Blunt*, 4 Mass. 402, which contains the following obiter remark: "When goods sufficient to satisfy the judgment are seized on a fieri facias, the debtor is discharged, even if the sheriff waste the goods, or misapply the money arising from the sale, or does not return his execution. For by a lawful seizure the debtor has lost his property in the goods."

In *Rice v. Tower*, 1 Gray, 426, 429, it was said by Mr. Justice Metcalf: "There are obiter dicta in the books, that by seizure on a fieri facias the debtor's property in the goods is lost; that the sheriff acquires a special property, but that the general property of the debtor is divested and is in abeyance: See *Ladd v. Blunt*, 4 Mass. 403. . . . But the law never was so. The

general property in goods seized on execution remains in the debtor until they are sold." For this last position a number of cases are cited which ³⁵² fully support it: See, also, *Samuel v. Duke*, 3 Mees. & W. 622; *Attorney General v. Leonard*, L. R. 38 Ch. Div. 622; *Grant v. Lyman*, 4 Met. 470, 476, per Shaw, C. J. The question is discussed in a learned note by Mr. Metcalf to the case of *Ayer v. Aden*, Yel. 44, Am. ed., note 2.

We are aware that in some other jurisdictions the levy of an execution on personal property of sufficient value to satisfy the same operates *prima facie* as a satisfaction of the judgment so as to bar further executions or levies, or a *scire facias*, or an action on a judgment. But this is not the rule in this commonwealth. By the Public Statutes, chapter 171, section 17, it is provided: "If a judgment remains unsatisfied after the expiration of the time for taking out execution thereon, the creditor may have a *scire facias* to obtain a new execution, or he may at any time after the judgment have an action of contract thereon." This section was first enacted by the Statutes of 1795, chapter 61, and has been in force since: Rev. Stats., c. 97, sec. 8; Gen. Stats., c. 133, sec. 17.

In *O'Neal v. Kittredge*, 3 Allen, 470, which came before the court, on a demurrer to a declaration, for the balance due on a judgment, it was held that the demurrer need not set forth the balance due on the judgment or the amount sought to be recovered, and it was said that if any payment had been made, which reduced the amount due on the judgment, this was matter in defense which the defendant was bound to aver and prove.

In *Linton v. Hurley*, 114 Mass. 76, which was an action on a judgment, it appeared that an execution had been taken out but had not been returned, and it was held that the action could be maintained, without regard to the question whether an execution had been taken out or returned, unless the defendant proved payment or satisfaction, citing the statute above quoted.

Wilson v. Hatfield, 121 Mass. 551, resembles very much the case at bar. The plaintiff sued on a judgment, which was proved. It appeared that execution had been issued on the judgment, but not returned into court; but there was no evidence introduced by the plaintiff to show what had been done by virtue of the execution or of any proceedings thereon, nor was any evidence introduced to show its loss, or to give any account thereof. The justice of the superior court thereupon ruled that the plaintiff could not recover. This ruling was

held to be ⁵⁵³ erroneous, on the ground that the defendant did not show payment or satisfaction.

In accordance with these decisions and what has been before said, we are of opinion that the value of the goods at the time they were taken by the officer is immaterial.

Exceptions overruled.

JUDGMENT—SATISFACTION BY LEVY.—The levy of an attachment on personal property does not amount to a satisfaction of the judgment: See extended note to *Trapnall v. Richardson*, 58 Am. Dec. 853; but the levy of an execution is prima facie a satisfaction: *Boos v. Morgan*, 130 Ind. 305, 30 Am. St. Rep. 237; and is a good plea in bar to a scire facias or action of debt on the judgment: See extended note to *Trapnall v. Richardson*, 58 Am. Dec. 856, 857.

SMITH v. POSTAL TELEGRAPH CABLE COMPANY.

[174 MASSACHUSETTS, 576.]

NEGLIGENCE—RECOVERY FOR FRIGHT—ALLEGING GROSS NEGLIGENCE.—The rule that there can be no recovery for sickness due to the purely internal operation of fright caused by a negligent act cannot be avoided by calling the negligence gross and alleging that the defendant ought to have known that the result complained of would follow his act.

Tort for personal injuries. Defendant was locating telegraph poles within ten feet of the building occupied by the plaintiff, and was blasting a ledge of rock for this purpose. The defendant did not protect the ledge in the blasting or notify the plaintiff that the blasting was being done. The ledge exploded with great noise, and large quantities of rocks were thrown into the air and fell on plaintiff's house, and plaintiff was made sick by reason of the shock. The defendant, it was alleged, acted with gross carelessness and with utter indifference to the consequences that it ought to have known would follow. A demurrer to the complaint was sustained.

E. T. McCarthy, for the plaintiff.

R. F. Sturgis, for the defendant.

⁵⁷⁷ **HOLMES, C. J.** The point decided in *Spade v. Lynn etc. R. R. Co.*, 168 Mass. 285, 60 Am. St. Rep. 393, and *White v. Sander*, 168 Mass. 296, is not put as a logical deduction from the general principles of ⁵⁷⁸ liability in tort but as a limitation of those principles upon purely practical grounds: See, further,

Spade v. Lynn etc. R. R. Co., 172 Mass. 488, 70 Am. St. Rep. 298, and *Silsbee v. Webber*, 171 Mass. 378, 380, 381. If the rule is to be adhered to that there can be no recovery for sickness due to the purely internal operation of fright caused by a negligent act, it cannot be avoided by calling the negligence gross, and alleging that the defendant ought to have known that the result complained of would follow his act. Negligence with reference to a given consequence means that the consequence ought to have been foreseen, and although the distinction between gross negligence and negligence is known to the law, still, having regard to the grounds for the above-mentioned rule, to allow it to be avoided by such an allegation would be to do away with it. The decisions leave open the question whether if the harm to the plaintiff was actually foreseen and intended that would make a difference. It is possible that in some cases motive and actual intent would be more considered in this commonwealth than they would be in England. That question may be left until it arises.

Judgment for the defendant.

NEGLIGENCE—DAMAGES FOR FRIGHT.—In an action to recover damages for an injury sustained through the negligence of another, there can be no recovery for a bodily injury caused by mere fright: *Notes to Spade v. Lynn etc. R. R. Co.*, 70 Am. St. Rep. 302.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

BELCHER v. CURTIS.

[119 MICHIGAN, 1.]

MORTGAGES—WITHHOLDING FROM RECORD—FRAUD ON CREDITORS.—Withholding a mortgage from record to enable the mortgagor to obtain credit is a fraud upon such creditors as extend credit in reliance upon the mortgagor's unencumbered title.

MORTGAGES—WITHHOLDING FROM RECORD—FORECLOSURE—CONFESSION OF JUDGMENT.—A mortgagee seeking to foreclose a mortgage withheld by him from record to enable the mortgagor, a partnership, to obtain credit, cannot question a judgment by confession in favor of a creditor who extends credit in reliance upon the record, upon the ground that such confession of judgment is signed by only one of the partners, if the partner not signing raises no question as to its validity.

MORTGAGES—FRAUD—JUDICIAL SALES—ESTOPPEL.—A judgment creditor, against whom a mortgage is fraudulent, cannot, after purchasing the property at a judicial sale under his judgment, question the validity of the mortgage. He cannot use the mortgage to prevent competition at the sale under which he purchases, and then set up the debtor's fraud to vitiate the mortgage.

Huggett & Smith, for the appellant.

G. C. Fox and A. W. Brickwood, for the appellees.

* **MOORE, J.** The defendants, Curtis & Son, were in May, 1894, engaged in a manufacturing business at Charlotte. May 19, 1894, they gave a mortgage of fifteen thousand dollars to Frank S. Belcher, deceased, to secure present and future indebtedness. The mortgage was not recorded until the 5th of June, 1895. In the interval between the giving and recording of the mortgage, Curtis & Son purchased goods upon credit from Swift & Co., and from Schrenk & Co., defendants herein.

Neither of these companies knew, at the time the credit was given, of the existence of the Belcher mortgage. March 17, 1896, Swift & Co. obtained a judgment against Curtis & Son for one hundred and sixty-six dollars and twenty cents and costs of suit. A transcript of this judgment was taken to the circuit court. An execution was issued, and a levy made upon the property covered by the mortgage, but no sale of the property was made. June 15, 1896, Schrenk & Co. commenced suit against Curtis & Son, upon which they obtained judgment November 16, 1896, for two thousand and twelve dollars and costs. A levy was made upon the property covered by the mortgage, and it was sold by the sheriff to Mr. Riegelman, the agent for Schrenk & Co., and for their benefit, for the amount of the judgment. No money was paid except the costs, and the execution was returned satisfied. This is a proceeding to foreclose the Belcher mortgage, to which Swift & Co. and Schrenk & Co. are made parties. The circuit judge found that the withholding of the mortgage from the record was a legal fraud against Swift & Co. and Schrenk & Co. He also found that Schrenk & Co. are not in a position to challenge the priority of the ² mortgage, but that Swift & Co. may challenge its priority. He granted a decree in favor of the complainant against all the defendants except Swift & Co., and postponed the mortgage as to its claim. The complainant appeals from that portion of the decree affecting the claim of Swift & Co. Schrenk & Co. also appeal from the decree.

It is claimed on the part of the complainant that the testimony of the copartners Curtis and son was not competent evidence, as Mr. Belcher is dead, and had knowledge of the same facts about which they testified. We do not think it important to discuss that question. While there is nothing to indicate any moral turpitude, it is not possible to read the record, omitting their testimony, without coming to the conclusion that the mortgage was withheld from the record because it was believed to record it would affect the credit of Curtis & Son. The withholding it from the record enabled them to obtain credit of Swift & Co. and Schrenk & Co., when they would not have been able to do so if the mortgage had been recorded. The failure to record the mortgage operated as a legal fraud upon these creditors.

The complainant attacks the judgment of Swift & Co., first, because of its form; and second, because the confession of judgment was signed only by Henry Curtis. We do not

think the form of the judgment is fatally defective. The property which is sought to be reached by the execution issued upon the judgment is partnership property. There is nothing in the record to show Jonathan Curtis ever questioned the right of Henry Curtis to confess judgment. In 1 Black on Judgments, section 57, it is said: "A member of a firm has no authority, by virtue of his mere relation to the partnership or his general power to act as its agent, to confess a judgment against the firm; and, if judgment be entered on such a confession, it will be void as against his copartners, though binding as a personal charge upon himself."

In 17 American and English Encyclopedia of Law, 1042, it is said that one partner cannot confess judgment without the consent of ⁴ his copartners, and the court will relieve the non-assenting partners, either by setting aside the judgment, or by restraining execution when issued against their individual property.

"But it will not be inferred without proof that the confession was unauthorized, and the judgment cannot be . . . collaterally impeached. . . . Prior parol assent, is sufficient, however, to authorize such a confession, and a subsequent ratification may be established by proof of circumstances indicating assent": 17 Am. & Eng. Ency. of Law, 1045.

In the note to 1 Lindley on Partnership, second American edition, 644, it is said: "Though one partner cannot confess a judgment against another partner, even for a partnership debt, yet a creditor of the firm cannot be permitted to make objection to the judgment on that account; and a sale of partnership property, on an execution issuing upon such a judgment, will pass a perfect title to the purchaser, and, if the first lien, will be entitled to the proceeds of the sale; but the judgment will not affect the persons nor the separate property of the other partners: *Grier v. Hood*, 25 Pa. St. 430." And in *Ross v. Howell*, 84 Pa. St. 129, it was held that "the interest of all the partners in the partnership property may be sold under an execution upon a judgment confessed by a single partner in the firm name and for a firm debt."

There is no question about the indebtedness. The other partner is not questioning the judgment. We do not think the complainant is in a position to successfully do so.

Was the decree wrong as to Schrenk & Co.? The questions involved are not new in this court. When these defendants learned of the Belcher mortgage, they did not levy upon the

property, and then seek to set aside the mortgage before making a sale. The mortgage was good between the mortgagors and the mortgagee, and as to everyone else, except creditors who had been induced to give credit, who would not have done so had it been recorded. ⁵ No one but Schrenk & Co. knew whether they intended to attack the validity of the mortgage. Other bidders at the sheriff's sale found the property with what appeared to be a valid mortgage upon it. In making their bids, they would necessarily take that fact into consideration. Would it not be unfair to other bidders and to the mortgagee to enable the judgment creditor to make his bid, and then allow him to have the mortgage set aside?

There is a full discussion of the principles involved in the case of *Messmore v. Huggard*, 46 Mich. 558: "It cannot plausibly be claimed that the law will suffer the judgment creditor to occupy any more favorable position as bidder at his sale than do all other persons. Judicial sales are required to be public for the purpose of inviting full and free competition, with the primary object of producing for the benefit of parties concerned as large a price of public biddings can secure for them. A secondary object is to give all who may desire the property an equal opportunity to compete for it. But full and free competition implies that all parties have equal knowledge of the state of the title; and the policy of the law is defeated if some one party may bid with such advantages as render competition impossible: *Ledyard v. Phillips*, 32 Mich. 13. But nothing can be plainer than that if the judgment creditor could bid with the secret assurance that he was to have an unencumbered title, when others must suppose they were buying subject to the mortgage, this assurance gave him an advantage in bidding to the full amount of the mortgage, and practically put competition entirely out of the question. Not only would this be unfair to other bidders, and for that reason inadmissible, but it would be particularly unfair to the mortgagee. When the sale appears to be of the equity of redemption only, the mortgagee has no occasion to trouble his mind about it; but if he were distinctly notified that it was made in hostility to his mortgage, he might, even if conscious of his good faith, prefer to redeem, rather than encounter the risks of litigation. This would be his legal right, and it cannot lawfully be taken from him through a secret understanding between the officer and the creditor, of which he has neither actual nor implied notice. It

is true that if the defendant, Francis Huggard, has knowingly accepted a fraudulent mortgage, and becomes ⁶ a loser thereby, he is entitled to no sympathy; but even voluntary fraud does not put one's interests out of the protection of the law, or entitle the party defrauded to confiscate them. A fraudulent conveyance is good as between the parties (*Cleland v. Taylor*, 3 Mich. 201; *Millar v. Babcock*, 29 Mich. 526; *McMaster v. Campbell*, 41 Mich. 513); and even creditors are not permitted to assail it, except by judgment and execution: *Fox v. Willis*, 1 Mich. 321. And there may be equities between the parties which will support a mortgage, void as to creditors, when the creditors do not attack it by proper proceedings. While, therefore, the complainant had an undoubted right to have the bona fides of the mortgage tested before sale, there can be no equity in permitting him to purchase the land apparently subject to the mortgage, and then to have its lien annulled afterward. He has a right to reach his debtor's property and have it sold for what it will bring at a fair and open sale; but he has no claim to speculate out of his debtor's fraud, and, by using the mortgage to keep others from competing, obtain the property for so much less than its value. A purchase under such circumstances must be held to be what it appeared to be at the sale—a purchase subject to the mortgage": See, also, *Cranson v. Smith*, 47 Mich. 189; *Wolf v. O'Connor*, 83 Mich. 301.

Decree is affirmed, with costs.

Grant, C. J., Montgomery and Long, JJ., concurred.

Hooker, J., did not sit.

MORTGAGES, FAILURE TO RECORD—CREDITORS.—Though withholding a mortgage from record to maintain the credit of the mortgagor does not justify the court in holding, as a matter of law, that the mortgage is fraudulent and void as to creditors of the mortgagor, yet it is a badge of fraud to be considered with other circumstances in determining whether or not there was, in fact, a fraudulent intent in failing to record the mortgage: *Hutchinson v. First Nat. Bank*, 133 Ind. 271, 36 Am. St. Rep. 537.

PARTNERSHIP—CONFESSION OF JUDGMENT.—On the effect of a confession of judgment by one partner, see *Boyd v. Thompson*, 153 Pa. St. 78, 34 Am. St. Rep. 685, and note.

PEOPLE v. MALSCH.

[119 MICHIGAN, 112.]

CRIMINAL LAW—NEGLECT TO SUPPORT FAMILY.—Under a statute providing that all persons who, being of sufficient ability, refuse or neglect to support their families, or who leave their wives or children a burden on the public, shall be deemed to be disorderly persons, a person who neglects or refuses to support his family may be validly convicted of being a disorderly person, although such family does not become a burden upon the public.

STATUTES—INTERPRETATION—COMPETENCY OF WITNESSES.—If the provisions of a statute are incorporated by reference into another statute, and the earlier statute is subsequently repealed, the provisions so incorporated continue in force so far as they form part of the second enactment. This rule applied to a statute making the wife a competent witness against her husband in cases growing out of his neglect or refusal to support his family.

HUSBAND AND WIFE—NONSUPPORT OF FAMILY—DEFENSES.—A husband cannot justify nor excuse his abandonment and nonsupport of his family on the ground that it is done in order to give his services to his father in expectation of succeeding to the latter's property.

O'Hara & O'Hara, for the appellant.

G. M. Valentine, prosecuting attorney, for the people.

¹¹² **HOOVER, J.** The defendant was convicted upon a complaint and warrant charging that ¹¹³ "Albert Malsch, of said township of Lake, has been, and is, a disorderly person, within the meaning of section 1 of Act No. 264 of the Public Acts of Michigan of 1889, being section 1997a of 3 Howell's Annotated Statutes of the state of Michigan, and amendments thereto, for that the said Albert Malsch, at the township of Lake, in said county, during and at the times aforesaid, he, the said Albert Malsch, being then and there a married man with a wife and child then and there lawfully dependent upon him, the said Albert Malsch, for their support, and he, the said Albert Malsch, being then and there, during and at the times aforesaid, a person of sufficient ability so to do, has during said time, and does, refuse and neglect to support or contribute toward the support of his said wife and child, contrary to the provisions of the statute," etc.

The statute reads: "All persons who run away, or threaten to run away, and leave their wives or children a burden on the public; all persons who, being of sufficient ability, refuse or neglect to support their families, or who leave their wives or

children a burden on the public, . . . shall be deemed disorderly persons."

The point is made that the complaint and warrant contain no allegation that the wife and child were left a burden upon the public, and that the testimony fails to show such fact; and it is urged that for this reason the court should have directed a verdict of acquittal. Counsel cite several cases which hold that similar acts are designed to redress public grievances, rather than to provide a remedy for the wife, in addition to those afforded by civil proceedings: *People v. Naehr*, 1 N. Y. Cr. Rep. 513; *People v. Walsh*, 11 Hun, 292; *Bayne v. People*, 14 Hun, 181; *State v. Watson*, 58 N. J. L. 499. An examination will show that all of these cases arose under statutes clearly making the injury to the public an essential element. In New Jersey, complaint could only be made by an officer when the public interests were affected. The New York cases arose under statutes including similar provisions, and not containing the clause in our statute ¹¹⁴ upon which the counsel for the people rely, viz.: "All persons who, being of sufficient ability, refuse or neglect to support their families." These cases are distinguished from the case of *People v. Pettit*, 3 Hun, 416, upon the express ground that neglect to support was an ingredient of the offense under former laws, and was stricken out by amendment: See *People v. Walsh*, 11 Hun, 293; *Laws N. Y. 1844, c. 174, sec. 6*. The language of our law (section 1997a), by its terms, covers the case of one who refuses or neglects to support his family; and we think it was not the intention to limit the liability of the husband to instances where the public has actually been called upon to afford relief, thus denying liability where a wife, through her own exertions or the aid of friends, avoids pauperism. The statute is broad enough in its terms to cover all cases of unjust neglect, and we think it should not be limited by the construction contended for. This view receives corroboration from the fact that the former provisions of the law (1 Howell's Statutes, section 1985) very clearly supported the contention of the defendant's counsel. It read: "All persons who . . . refuse or neglect to support their families, and leave their wives or children a burden on the public"; whereas the present law contains "or" instead of "and," as does the law of 1883.

The law of 1885 (3 Howell's Statutes, section 7546) provides that "a wife shall not be examined as a witness for or

against her husband without his consent, except in cases where the cause of action grows out of a personal wrong or injury done by one to the other, or grows out of the refusal or neglect to furnish the wife or children with suitable support, within the meaning of Act No. 136 of the Session Laws of 1883." In 1889 an act was passed, entitled "An act relative to disorderly persons, and to repeal chapter 53 of the Compiled Laws of 1871, as amended by the several acts amendatory thereof," of which amendatory acts said Act No. 136, Public Acts of 1883, was one. Although the act of 1889 substantially re-enacted section 1 of chapter 53 (i. e., Act No. 136, Public Acts of 1883), it is contended that ¹¹⁵ such act is repealed, and that the provisions of section 7546 cannot apply to the new disorderly act passed in 1889. The law of 1885 refers to the then existing disorderly act, instead of repeating the substance of its pertinent provisions. By such reference, such act became a part of the act of 1885; and it is an established rule that in such a case it is not affected by a subsequent repeal of the act referred to: See Endlich on Interpretation of Statutes, sec. 492. We have followed this rule in the cases of Darmstaetter v. Moloney, 45 Mich. 621, and Regents of University of Michigan v. Auditor General, 109 Mich. 134. The provisions of the present disorderly act are identical with those of the act of 1883, so far as the former were incorporated in section 7546. We are of the opinion that such section authorized the reception of the testimony of the wife.

Of the other questions, little can be said of interest to the profession. We think the cross-examination of the defendant was proper, as it tended to controvert the claim that his wife had abandoned him, and improperly refused to accept the support which he offered to give her at the home of his father. To our minds, the proposition that the husband was at liberty to leave his wife and child without support, that he might give his services to his father, in the expectation of succeeding to his rights in the paternal home after his father should die, is not tenable. He cannot thus escape his domestic and public obligations.

We find no error, and the circuit court is directed to proceed to judgment.

The other justices concurred.

CRIMINAL LAW—FAILURE TO SUPPORT WIFE.—The statutory offense of failure of a husband to support his wife consists

in his willful neglect to provide for her reasonable support and maintenance, and the fact that she has financial means does not relieve him from his statutory duty to support her: *Poole v. People*, 24 Colo. 510, 65 Am. St. Rep. 245.

STATUTES—REPEAL AND RE-ENACTMENT.—If a repealed statute is re-enacted in the same words, or in effect, by an act which goes into force at the same time the old act is repealed, it is continued in uninterrupted operation: See extended note to *Wharton v. State*, 94 Am. Dec. 220.

SMITH v. SPRAGUE.

[119 MICHIGAN, 143.]

LANDLORD AND TENANT—SURRENDER—RIGHT TO GROWING CROP.—A tenant after surrender of the leased premises has no right to the crop growing thereon, cannot maintain an action therefor, and can transfer no right therein to another.

ESTOPPEL—LANDLORD AND TENANT.—A landlord who, without objection, permits a tenant, after his surrender of the premises, to cut a crop planted by him and growing thereon, and thereafter attaches it for rent due, is not estopped from asserting title to the crop, as against the tenant or his transferee, if the landlord acted in ignorance of his legal rights.

ESTOPPEL—EQUITABLE estoppel preventing a person from asserting his legal rights to property must involve some degree of moral turpitude in the conduct of such person, which has misled others to their injury; conduct or declarations founded upon ignorance of one's rights does not constitute such estoppel.

C. C. Yerkes, for the appellant.

A. and S. H. Perry, for the appellee.

¹⁴⁸ **LONG, J.** This is a suit in trover for the conversion of a quantity of wheat. Plaintiff's contention is that in the winter of 1894-95 defendant Sprague orally leased his farm for one year to one Orrin Cook, for money rent. The lease commenced with Cook's occupancy, about March 1, 1895. At that time there was growing on the farm a field of wheat of about eighteen acres, and in the lease it was agreed that Cook should have the privilege of sowing an ¹⁴⁹ equal acreage that year, and of harvesting it the next. At the expiration of the first year, the parties settled satisfactorily; and it was then verbally agreed that Cook should have the place for another year at substantially the same terms as the first year. The arrangement for the second year was made in February, 1896, and Cook occupied the farm up to about March 1, 1897, when he moved away.

On July 15, 1897, he went back to the farm, and cut and stacked the wheat now in question, and which was produced from the wheat he had sown in the fall of 1896. On September 3, 1897, he executed a bill of sale of the wheat to the plaintiff, the consideration of the sale being two hundred and twenty-five dollars, which Cook owed plaintiff for work done on the farm. September 21, 1897, defendant went before a justice, and swore out a writ of attachment against Cook, and directed a constable to levy it on the stacks of wheat. Before this attachment suit became returnable, defendant caused the same to be discontinued, and then threshed the wheat, sold it, and kept the proceeds; and on the trial it was conceded that defendant converted it to his own use. The court instructed the jury to find for the defendant.

This lease was not in writing, and, under the holding of this court in *Carney v. Mosher*, 97 Mich. 554, it expired one year from the date it was made; that is, one year from February, 1896. In March, 1897, Mr. Cook moved off the farm and presumably surrendered it to the defendant. He then sold the wheat to plaintiff and, under an arrangement with plaintiff, went to the farm in July following, cut the wheat, and stacked it. Under the rule in *Carney v. Mosher*, 97 Mich. 554, Mr. Cook, the lessee, would have had no right to the wheat after the surrender of the premises, and could not have maintained an action therefor. The plaintiff had no greater right.

But the plaintiff maintains that the defendant is now estopped from setting up title to the wheat, because he stood by and saw Mr. Cook cut and stack it, and thereafter commenced proceedings by attachment against Cook, ¹⁵⁰ levying upon the wheat as his (Cook's) property. It is apparent that both defendant and Cook were mistaken as to their legal rights. Cook undoubtedly supposed when he left the farm that he would have the right to return and cut and harvest the crop, as it was agreed he might. He owed defendant for a year's rent, and defendant claimed a lien on the wheat for the rent, and most likely understood that that was the extent of his right in the crop. Under the rule in *Carney v. Mosher*, 97 Mich. 554, the defendant was the legal owner of the crop. When Cook undertook to cut it, defendant claimed that he must be paid his rent out of it. He was then trying to save his rights as he then understood them, and, in making the levy of the attachment, he was undertaking to enforce that right. Subsequently, he

was advised as to his legal rights, advised that he had the title, and then sought to enforce those rights by retention of the crop. Defendant apparently acted in good faith, and without knowledge of his legal rights, when making the levy of attachment. We think it is not a case for the application of the doctrine of equitable estoppel. To constitute an estoppel of this character, such as will prevent a party from asserting his legal rights to property, there must be some degree of turpitude in the conduct of the party to the estoppel, which has misled others to their injury. Conduct or declarations founded upon ignorance of one's rights have no such ingredient, and seldom work any such result: *Henshaw v. Bissell*, 18 Wall. 255. No deception was practiced upon Cook. He knew the facts as fully as the defendant did. The plaintiff is in no better position than Cook would be had he brought the action. The property was on the defendant's farm at the time plaintiff took his bill of sale, and he knew all the facts which defendant knew. He also took the wheat on a past due indebtedness from Cook to him, and was not, therefore, a bona fide purchaser. Upon the whole record, the court was not in error in directing the verdict for defendant.

The judgment must be affirmed.

The other justices concurred.

LANDLORD AND TENANT—CROPS.—A tenant under a cropping lease deprives himself of all claim to a crop which he has planted, if, without fault on the part of the landlord, he repudiates the agreement and voluntarily abandons the premises: *Kiplinger v. Green*, 61 Mich. 840, 1 Am. St. Rep. 584.

ESTOPPEL IN PAIS.—Mutual mistake as to the law, the facts being known to all the parties without concealment or misrepresentation, furnishes no ground upon which one of the parties can invoke the doctrine of estoppel against the other: *Gjerstadengen v. Van Dusen*, 7 N. Dak. 612, 66 Am. Rep. 679; *Estis v. Jackson*, 111 N. O. 145, 82 Am. St. Rep. 784. See further on the essentials of equitable estoppel, the note to *Sweeney v. Pratt*, 66 Am. St. Rep. 107.

BOWEN v. BROGAN.

[119 MICHIGAN, 218.]

MORTGAGES—FORECLOSURE.—No legal title is obtained by the foreclosure of a mortgage upon which nothing is due at the time of the foreclosure.

MORTGAGES—INTEREST—LIFE TENANT AND REMAINDERMAN.—As between the owners of the fee and the life estate in mortgaged property, the owner of the life estate is charged with the duty of paying interest upon the encumbrance, and the life tenant cannot, by neglecting this duty and allowing the mortgage to be foreclosed, acquire title through the foreclosure sale, and cut off the remainderman.

MORTGAGES—IRREGULAR FORECLOSURE.—Ejectment may be maintained against a mortgagor in possession under a void or irregular foreclosure.

MORTGAGES—IRREGULAR FORECLOSURE—EJECTMENT—CONTRIBUTION BY REMAINDERMAN.—A grantee of a deceased life tenant in possession of the property under a void foreclosure of a mortgage cannot enforce contribution from the remainderman as a condition precedent to the latter's recovery in ejectment.

ADVERSE POSSESSION—LIFE TENANT AND REMAINDERMEN.—A life tenant in possession or his grantee during the lifetime of the former cannot hold adversely to the remaindermen.

J. M. Hatch and L. C. Miller, for the appellants.

F. W. Clapp, for the appellees.

219 MOORE, J. Plaintiffs, as heirs at law of David Bowen, deceased, commenced an action of ejectment to obtain possession of real estate occupied by defendants. The case was tried before the circuit judge, who decided in favor of defendants.

David Bowen, at the time of his death, was the owner of the land in question. He was in possession of the land at the time of his death, in 1872. He left no children surviving him, but left a widow and an adopted son. He left no will. In 1871, Mr. Bowen gave Mr. McKinstry a mortgage upon the land in question, for seven hundred dollars payable October 10, 1880. The interest was payable annually. The mortgage contained an interest clause, providing that, if default was made in the payment of interest, the principal might be treated as due. A foreclosure of this mortgage, by advertisement, was commenced in March, 1874, which notice stated that there was due, as principal and interest six hundred and forty-five dollars and fifteen cents. June 19, 1874, the sheriff sold the property to Robert Murphy for seven hundred and thirty-five dollars and eighty cents, and issued to him a sheriff's deed, which was recorded

June 24, 1875. On the same day Mr. Murphy gave a quitclaim deed of the premises to the widow of David Bowen, who had again married. She had remained in possession of the premises all of the time, and continued to remain in possession of them up to the time of her death, which occurred in December, 1886. Prior to June, 1875, Mrs. Bowen was appointed administratrix of her husband's estate, and was such administratrix at the time the land was deeded to her by Mr. Murphy. The adopted son of Mr. and Mrs. Bowen died in December, 1873; and it is altogether probable the Bowens regarded this son as their legal heir, as the law under which he was adopted was not declared unconstitutional until after the death of Mrs. Bowen. After the death of Mrs. Bowen, the land was assigned by the probate court to Richard White and Kate Donahue, as the only heirs of Mrs. Bowen, and they sold the premises to Patrick Brogan and his wife.

It is the claim of the plaintiffs that, at the time the ²²⁰ mortgage was foreclosed, the interest and part of the principal had been paid, and nothing was due upon it, so that the foreclosure proceeding was a void proceeding, and no title was obtained through it. The circuit judge found there was paid in July, 1873, upon this mortgage five hundred and forty-seven dollars and twenty cents. We think this finding was justified by competent and material testimony. If this amount was paid, it is evident there was nothing due upon the mortgage when it was foreclosed, and the right to foreclose it did not exist, and no legal title was obtained by the foreclosure.

There are also other objections to the defense which is interposed here. In the absence of a will and of children, Mrs. Bowen's interest in her husband's real estate was a life interest (2 Howell's Statutes, section 5772a, subdivision 2); and upon the death of Bridget Bowen, the mother and the two brothers of David Bowen, deceased, would be entitled to the property: 2 Howell's Statutes, sec. 5772a. Mrs. Bowen, then, being possessed of the life estate, and the plaintiffs in this case being the remaindermen, what was the duty of Mrs. Bowen in relation to the real estate and the mortgage upon it? The rule is well settled that, as between the owners of the fee and the life estate of encumbered property, the owner of the life estate is charged with the duty of paying the interest upon the encumbrance: *Campbell v. Campbell*, 21 Mich. 438; *De-freeze v. Lake*, 109 Mich. 415, 63 Am. St. Rep. 584; *Damm v. Damm*, 109 Mich. 619, 63 Am. St. Rep. 601. It, then, being

the duty of Mrs. Bowen to pay the interest upon the mortgage, by neglecting the duty, and allowing the mortgage to be foreclosed, she could not, by acquiring the property through the foreclosure sale, cut off the title of the remaindermen. To allow her to do so would be to allow her to profit by her neglect of duty: *Dubois v. Campau*, 24 Mich. 370; *Connecticut etc. Ins. Co. v. Bulte*, 45 Mich. 113; *Whitney v. Salter*, 36 Minn. 103, 1 Am. St. Rep. 656.

It is claimed by defendants that, there having been a foreclosure of this mortgage, even though the foreclosure ²²¹ is irregular, the purchaser is subrogated to the rights of the mortgagee, and, being in possession, ejectment is not the proper remedy; but the proceeding must be in a court of equity: Citing *Gage v. Sanborn*, 106 Mich. 270; *Gale v. Eckhart*, 107 Mich. 465. It is also claimed that as Bridget Bowen was under no obligations to pay the principal of the mortgage, and the remaindermen were bound to pay it, this action cannot be sustained until the amount which the remaindermen should pay has been paid by them: Citing *Whitney v. Salter*, 36 Minn. 103, 1 Am. St. Rep. 656; *Davies v. Myers*, 13 B. Mon. 511.

The last-named authorities sustain the doctrine as contended for by defendants; but a very different rule prevails in this state as to the right of the mortgagee in the mortgaged property from what obtains in many of the states. The mortgage is not a grant of the land to the mortgagee, defeasible upon condition subsequent, and to become absolute on failure to pay at the specified time. It is a mere security, the estate in the land and the right of possession remaining in the mortgagor until the mortgage is foreclosed and the equity of redemption has expired: *Caruthers v. Humphrey*, 12 Mich. 270; *Crippen v. Morrison*, 13 Mich. 23; *Newton v. Sly*, 15 Mich. 391; *Hogsett v. Ellis*, 17 Mich. 351; *Newton v. McKay*, 30 Mich. 380; *Wagar v. Stone*, 36 Mich. 364. It cannot be said in this case that defendants are in possession by any act of the mortgagor. The maker of the mortgage was dead. The only persons having any interest in the mortgage besides the mortgagee, so far as the record discloses, at the time of the attempted foreclosure were Mrs. Bowen and the heirs at law of Mr. Bowen. Mrs. Bowen could not consent to put the mortgagee in possession at the time of the foreclosure; for, as we have already seen, it was her duty to pay the interest and to prevent the foreclosure. It does not appear the heirs at law ever consented to the foreclosure proceedings, or to the mortgagee's taking possession

thereunder. Ejectment may be maintained against the mortgagee in possession under a void, invalid, or ²²² irregular foreclosure: *Humphrey v. Hurd*, 29 Mich. 44; *Newton v. McKay*, 30 Mich. 380; *Sherrid v. Southwick*, 43 Mich. 515.

It is claimed title inures to defendants by reason of adverse possession. We have already seen that, by virtue of the statute, Mrs. Bowen had a life estate in the land. It is well settled that a life tenant in possession does not hold adversely to the remaindermen: *Lumley v. Haggerty*, 110 Mich. 552, 64 Am. St. Rep. 364; *Gindrat v. Weston Ry.*, 96 Ala. 162. Mrs. Bowen died in 1886. This action was brought in 1897. Title by adverse possession was not acquired by defendants.

Judgment is reversed, and a new trial ordered.

The other justices concurred.

MORTGAGES—LIFE TENANT—REMAINDERMAN.—As between a life tenant in possession and the remainderman, the former is bound to pay the interest and the latter the principal of any encumbrance to which the estate of both is subject: *Damm v. Damm*, 109 Mich. 619, 63 Am. St. Rep. 601.

MORTGAGES.—EJECTMENT will not lie by a mortgagor against a mortgagee in possession so long as the mortgage subsists: *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519; extended note to *Cotton v. Carlisle*, 7 Am. St. Rep. 33.

ADVERSE POSSESSION.—The possession of a life tenant cannot be adverse to a remainderman: *Lumley v. Haggerty*, 110 Mich. 552, 64 Am. St. Rep. 364, and note.

MOON v. MILLS.

[119 MICHIGAN, 296.]

EASEMENTS—RIGHTS OF WAY—REMOVAL OF OBSTRUCTION.—One of the owners in common of a right of way in an alley, who erects an obstruction on his part, beneficial to himself alone, but not incommoding his abutting owner, cannot be compelled to remove such obstruction.

EASEMENTS.—PRESCRIPTIVE RIGHTS MAY BE ACQUIRED IN AN ALLEY, though it was originally laid out as such.

ADVERSE POSSESSION.—TITLE TO PUBLIC HIGHWAYS may be acquired by adverse possession.

J. Yelland, for the appellants.

W. H. S. Wood, L. E. Howlett, and W. P. Van Winkle, for the defendant.

²⁰⁸ LONG, J. This bill was filed to compel the removal of a certain platform, stairway, and water-closet from and out of an alley situate between the premises of the complainants and the defendant. The alley is twelve feet wide and one hundred and sixty feet long, extending from the street to another alley at right angles with it. The complainants' premises, which are twenty-four feet in width, abut in the rear upon this first alley, and extend through to East street, upon which their store fronts. The defendant's premises, upon which there are three brick stores, face on Main street and extend to the alley in the rear. The obstruction complained of is a ²⁰⁹ platform twenty-nine feet ten inches in length, extending partly across the rear end of the second story of defendant's buildings. Leading down from the platform into the alley is a stairway about thirty-five inches in width. The platform is held in place by brackets fastened against the wall, twelve feet from the ground. The water-closet is beneath the stairway and not extending so far into the alley as the stairway itself. The stairway and platform are used for the purpose of reaching the second story of defendant's buildings, these stories being used as offices, living rooms, and dressmaking parlors.

The defendant purchased his premises from the heirs of Almon Whipple in 1880 and 1881. The alley in question also belonged to that estate. The deeds to the defendant, after describing the property, recite: "Together with a perpetual right of way twelve feet wide, parallel with Main street, extending from Clinton street south to the alley on lot number 33 of Cowdry's addition, running parallel with Grand River street, which right of way is to be used in common by the parties of the second part, their heirs and assigns, and the owners, their heirs and assigns, of the several lots and parcels of land lying west and bordering on the above-described alleys, according to the recorded plat," etc.

Soon after the defendant purchased his premises, these three store buildings were erected, and three different stairways built in the alley leading to the upper rooms of the stores. Fires occurred in the buildings some time in 1887, when the three stairways were rebuilt. No objection seems to have been made to these obstructions by anyone until the complainants purchased their property, on the opposite side of the alley, in 1897. While complainants were building their property, defendant took down the three stairways, and erected the platform and one

stairway instead. No objection was made by complainants to these changes while they were being made.

The case was heard in open court, and the bill dismissed. Complainants appeal. We think the testimony shows conclusively that the ³⁰⁰ complainants are not injured in any manner by these obstructions. The land in this alley was never dedicated to the public by any plat, and the only ones interested in the alley are those whose property abuts thereon. Under the deeds to the defendant, he has a perpetual right of way in the alley. Any encroachment must become a serious inconvenience to the parties having the right of way before it becomes a nuisance. The claim of complainants is that, as matter of law, they are entitled in a court of equity to a removal, though they show no equitable reasons why it should be so ordered. This contention cannot be sustained. The true rule is that one of the owners in common of a way, who erects an obstruction on his part, beneficial to himself, and which does not tend to incommode one who has an equal right, cannot be compelled to remove such obstruction: 19 Am. & Eng. Ency. of Law, 113.

There is another reason which prevents the complainants from sustaining their claim. The defendant obtained his deeds in 1880 and 1881, and in the following year erected his buildings, and from that time to the present has occupied the alley by the stairways erected in the alley in the rear of these buildings. There has been a continued, uninterrupted use of the alley by the stairways, under a claim of right, for more than seventeen years prior to the time of filing the present bill. Prescriptive rights may be acquired in an alley, though it was laid out as such: *Vier v. Detroit*, 111 Mich. 646. Title may be acquired to a public highway by adverse possession: *Essexville v. Emery*, 90 Mich. 183.

The court below was correct in dismissing complainants' bill. That decree will be affirmed, with costs.

The other justices concurred.

RIGHT OF WAY—OBSTRUCTION.—The rights of abutters on a narrow passageway in the rear of city lots are not infringed by projecting a building partly over such way but not interfering with the foot passage: *Burnham v. Nevins*, 144 Mass. 88, 59 Am. Rep. 61, and note. See, too, the extended notes to *Welch v. Wilcox*, 100 Am. Dec. 119; *Field v. Barling*, 41 Am. St. Rep. 828.

ADVERSE POSSESSION of a highway or alley for the statutory period gives title to the occupant: Note to *Meyer v. Lincoln*, 29 Am. St. Rep. 504. Compare *Crocker v. Collins*, 87 S. C. 327, 34 Am. St. Rep. 752.

GRAHAM v. MOFFETT.

[119 MICHIGAN, 303.]

VENDOR AND PURCHASER—VENDOR'S LIEN—FRAUDULENT REPRESENTATIONS.—A vendor is not entitled to a lien for damages resulting from fraudulent representations as to the value of chattels taken by him in payment for the land conveyed. He is only entitled to recover damages for the fraud, or to a rescission of the contract.

VENDOR AND PURCHASER—VENDOR'S LIEN—FRAUDULENT REPRESENTATIONS.—If a contract obligates the vendee to pay a given sum for land, and the vendor is subsequently induced by fraud to accept a chattel for the whole or a definitely fixed portion of such purchase price, the vendor may tender back the chattel and enforce a lien for the amount represented by it.

VENDOR AND PURCHASER—VENDOR'S LIEN—FRAUDULENT REPRESENTATIONS.—A vendor is not entitled to affirm a contract whereby he has agreed to take chattels in part payment of the purchase price, and maintain a lien for a deficiency arising from the failure of such chattels to equal their represented value, upon the theory that to that extent the consideration has not been fully paid.

VENDOR AND PURCHASER—FRAUDULENT REPRESENTATIONS.—A vendor is responsible for fraudulent representations inducing the sale, whether they are made by himself, or by a third person whom he expects to give the vendee false information and he allows the contract to be consummated with knowledge that the vendee is acting on such false information.

F. E. Robson and O. Kirchner, for the appellants.

Haug & Yerkes and E. F. Conely, for the appellee.

³⁰⁴ **HOOKE**R, J. On November 25, 1895, the parties to this suit made a contract in writing, by which the complainant agreed to sell a dwelling-house and lot in Detroit to the Moffetts, husband and wife, and they promised to pay therefor eleven thousand five hundred dollars, in manner following, viz.: "Five hundred dollars in cash this day, 20 shares of Ingham County Savings Bank stock, and \$5,500 cash, on or before November 30, 1895, and assume a mortgage of \$3,500, the interest upon which is to be paid by said party of the first part—paid to January 1, 1896."

This writing was the culmination of negotiations which covered a period of a week or more, during which most of the alleged misrepresentations are said to have been made. On the thirtieth day of the same month, according to the ³⁰⁵ testimony of Moffett, he asked Graham, who acted in the transaction on behalf of his wife, to take five shares more of the stock, as he was a little short of money; and it was finally agreed that

the Grahams should take eleven shares more, and the deed was delivered, and the consideration, including thirty-one shares of the Ingham County Bank stock, was paid, and the Moffetts entered into possession of the property. Some six or eight months later the bank went into the hands of a receiver, and the evidence shows that an assessment of sixty or seventy per cent upon the stock will be required to meet its obligations.

The bill in this cause was filed in February, 1897, and alleges that Moffett fraudulently represented this stock to be worth par, thereby inducing Graham to accept it at its par value for a part of the purchase price, whereas it was in fact of no value; and the bill prays the enforcement of a vendor's lien for the amount represented by such stock in the trade. The testimony of Graham shows that he offered to return the stock to Moffett, and demanded the property back, and that Moffett refused to accede to the demand. This bill appears to have been framed upon the theory that it was unnecessary to rescind the contract in toto, but that, the fraud being shown in relation to the stock, the vendor might treat the amount which it was understood to represent in the transaction as unpaid, and that the vendor's lien could be foreclosed to collect it. Upon the same theory, we presume that it might be contended that an action of assumpsit would lie, under the rule that such an action may be maintained for the unpaid price of real estate duly conveyed.

Lord Eldon, in defining the vendor's lien, used the following language: "Where the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, and by a receipt indorsed upon the back, if it is the simple case of a conveyance, the money, or part of it, not being paid, as between the vendor and the vendee, and persons claiming as volunteers, upon the doctrine of this ³⁰⁶ court, which, when it is settled, has the effect of a contract, though perhaps no actual contract has taken place, a lien shall prevail, in the one case for the whole consideration, in the other for that part of the money which was not paid": *Mackreth v. Symmons*, 15 Ves. 329, 337.

There is nothing in this definition that justifies the inference that a vendor has a lien for damages resulting from a breach of a contract, and we know of no case where it has been expressly held that such is the law, unless it be cases hereinafter discussed. It merely secures the payment of the promised money or price. The agreed purchase price may be, in whole or in part, chattels; as an agreement to sell some land

at an agreed price, for certain horses or bank stock, at a settled valuation. In case of such a contract, the vendor's lien would secure the performance of the promise, which would be to deliver the horses or the stock, not to pay money in lieu thereof; especially where, as in this case, the evidence shows conclusively that the vendee refused to take the property upon a money consideration. He may have been guilty of fraud in inducing the vendor to agree to take the stock as part of the consideration, but that fact will not authorize a court to make a different contract for him. It can only award him damages for the fraud, or permit a rescission of the contract: *Coit v. Fougere*, 36 Barb. 195; *Burns v. Taylor*, 23 Ala. 255.

There is a class of cases, however, in which a vendor's lien does exist, viz., where the contract obligates the vendee to pay a given sum for the land, and the vendor is afterward induced, by fraud, to accept a chattel for the whole or a definitely fixed portion of such purchase price. In such a case the vendor may tender back the chattel, and enforce a lien for the amount represented by it. This is upon the theory that the pre-existing contract is binding. Its fraudulent modification being rescinded, the contract itself is left to stand, with its attendant right of lien in the vendor. The testimony is conclusive that this is not one of these cases as to the twenty shares; for not only ³⁰⁷ does the writing show it, but the testimony is all to the effect that Moffett would not agree to buy the premises unless the twenty shares of stock should be accepted in part payment.

It is now proposed to carry this doctrine a step further, and say that although the vendee never agreed to pay cash, and expressly refused to do so, yet inasmuch as he was guilty of fraud, thereby inducing the vendor to reconsider her determination to sell for cash only, and consent to an exchange for stock, that equity will, in addition to the legal remedy through an action for damages for the fraud, and the equitable one of rescission, recognize the vendor's right to affirm the contract, and maintain a lien for the deficiency arising from the failure of the stock to equal its represented value, upon the theory that to that extent the consideration was not fully paid. This is a persuasive view to take of the case. It is an expeditious way to relieve the complainant, and it removes whatever danger there might be of a failure to collect a judgment for damages for the fraud, should one be recovered at law. But, on the other hand, it introduces inconsistencies and far-reaching

changes in the law. It enlarges the vendor's lien to include damages for a breach of contract as well as the unpaid price agreed upon. It introduces an element of uncertainty, by making it cover unliquidated claims, which have hitherto generally been excluded. It revolutionizes the doctrine of rescission, which requires a party to rescind a fraudulent contract in toto or affirm it as made. It allows the vendor to keep the chattel, and recover the damages in equity—a thing hitherto almost unknown.

There is a temptation to do full and complete justice between parties, if possible, especially where fraud is apparent, that tends to the extension of rules of law, which should only be made after careful consideration, for every innovation against the logic of the law is productive of confusion. In this case it would be gratifying if we could settle this matter here, instead of requiring the complainant ³⁰⁸ to pursue her legal remedy; but an illogical extension of the law of vendor's lien to cases involving unliquidated damages for fraud would be a heavy price to pay therefor. Certainty in the law is a growing necessity, and the broader the rules can be, consistent with general justice, the better. There is always danger in disregarding the logic or reason of a rule of law, sometimes not so discernible at the time as on later occasions, when the consequences confront the courts in other cases. It may be a simple thing in this case, and justified by the proof, to say that this stock is worth nothing, and therefore that the measure of recovery—may we not as properly say damages?—is plain; but, it would not be so easily and accurately determined if the chattel were a spavined horse.

We are cited to a few cases which are alleged to support the practice contended for by the complainant. Our own case of *Merrill v. Allen*, 38 Mich. 487, fails to reach the point in controversy, as in that case the agreement was to deed premises in part payment for other land. It was held that a lien existed when such premises were not deeded as promised, which is a different thing from asserting a lien after conveyance, because of a fraudulent representation of value. *Tobey v. McAllister*, 9 Wis. 463, is more nearly in point, but that case was heard upon demurrer, and we do not know what the contract was. In disposing of the case, the court says, speaking of certain notes of third parties: "For, if we were of the opinion that the respondent, by taking such securities, and trusting to the responsibility of third persons, thereby lost the implied lien upon

the property which the law would otherwise have given him, yet that certainty cannot be the case if there was fraud in the transaction."

This indicates that the vendor had a lien under the contract for the purchase money, of which he was deprived by fraud. It differs from our case, for here the purchase price was not money, but an agreed chattel, which was delivered. The question now under discussion does not ³⁰⁹ seem to have been raised, and the only proposition that appears to have been decided is that where one substitutes another's obligation for his own, through fraud, it does not release him from his obligation—a rule that is undoubtedly the law. Two other Wisconsin cases are cited, but they do not throw light upon the question.

A case will be found, however, which seems on all fours with the one before us, and a lien was sustained, reversing the vice-chancellor, who dismissed the bill upon the ground that the vendor's claim was one sounding in damages, and that there could not be a partial rescission of a contract: See *Bradley v. Bosley*, 1 Barb. Ch. 125. With this exception, our attention has been called to no case like the present one.

Our examination of the testimony satisfies us that at the time this contract was made Dr. Moffett knew that the bank was insolvent. He admits that he had anticipated a run upon it, and that the bank had closed its doors on a former occasion, while he was a large stockholder, a director, and a member of its discount or loan committee. He then incurred the criticism of the other stockholders for withdrawing a large deposit to avoid loss through a run which he anticipated, and which actually followed a few days afterward, causing the suspension of the bank. The bank was reorganized, but, although he continued to hold his stock, he preferred to keep his account elsewhere, and never afterward intrusted his funds to its keeping. He represented to Mrs. Graham and her husband that the stock was valuable, and was worth par; and we think the testimony justifies the statement that he did not content himself with stating an honest opinion as to the value of the stock, but used persuasion to induce the belief that it was valuable and worth par. The evidence convinces us that Dr. Moffett knew that this stock was not worth par, if he did not fully believe that it was worse than valueless, because likely to be assessed to pay debts.

Upon the part of the defense it is said that relief should be denied because the doctor's representations were not ³¹⁰ the

inducement upon which the complainant took this stock, but that she and her husband took other measures to ascertain the value of this stock, and relied upon the statement of the president of the bank that it was worth par, and that he would give par for it. There is testimony that, during the negotiations, Dr. Moffett represented that other stock of the bank had been sold or traded at par and above; and proposed that Mr. Graham consult the president of the bank, Mr. Ulrich, who lived at Mt. Clemens, offering to go with him for the purpose, but ultimately offering to pay the expense of telephoning to him. Thereupon Graham telephoned to him, and was informed that the stock was worth par, and he would pay par for it. This he afterward refused to do. Graham and his wife testify that they relied largely upon what Dr. Moffett said, but it is claimed that the testimony shows the contrary; and it must be admitted that there are, in their testimony, statements which indicate that, after receiving this information, they yielded to Dr. Moffett's solicitation, and took the stock. Moffett testified that he had no understanding with Ulrich, and that he was not even acquainted with him, and there is no testimony showing the contrary; yet it is manifest that, had Ulrich or Moffett stated what we believe that they must have known about the condition of the bank, the stock would not have been accepted by the complainant, and we cannot avoid a suspicion that Moffett relied on an anticipated reluctance upon the part of the president to state the true condition of the bank, or value of the stock, which, under the circumstances, would probably have been hazardous to the bank. We cannot persuade ourselves to believe that Moffett did not know that the stock was worth much less than par, and, that being so, it was a fraud to induce Graham to seek information which he hoped would be false. We are of the opinion that, when one wishes to take advantage of his fellow, he cannot shelter himself behind the doctrine of caveat emptor if he either makes misrepresentations himself or designedly sends him to one whom he expects to give him false information,³¹¹ and allows the contract to be consummated with knowledge that the other party is acting on such false information. Either is fraudulent, and it matters not which is the inducement that operates on the mind of the victim. But, the acceptance of the eleven shares grew out of a later conversation, in which, according to Mrs. Graham's testimony, renewed assurances of value were asked of and given by Moffett, and we should hardly go so far as to protect the defendants in an unconscion-

able transaction through a presumption that Mrs. Graham did not rely upon Moffett's statements, but did upon Ulrich's.

It is said that it was the duty of the complainant to act promptly on discovering the fraud, by rescinding the contract; that she delayed for six months after learning the fact, in January, 1896; and that she never made a tender of the remainder of the consideration. Mr. Graham testified that he made demand for a reconveyance in January, and offered to pay back what he had received, and that Dr. Moffett said that he would not do it. Dr. Moffett denies this, but we infer that the circuit judge believed Mr. Graham's statement; and a refusal to accept a tender makes proof of a formal tender unnecessary, even in an action at law.

We have seen that there may be cases where the chattel is taken as a substitute for an existing obligation to pay money, and, again, that it may constitute the whole or a partial consideration for the original contract. This case illustrates both classes of cases. The agreement was to make payment by twenty shares of stock, agreed to be worth two thousand dollars, and the assumption of a mortgage, and the remainder in cash. Afterward the vendor was induced to allow the vendee to substitute eleven additional shares of stock for eleven hundred dollars of the sum which he was under contract obligations to pay in cash. As to the twenty shares, there was no lien, because they were delivered as promised; but as to the eleven shares the lien would exist, if their substitution was permitted by reason of the fraud of the vendee.

We regret that we cannot afford the complainant full relief, but settled rules of law forbid. The decree of the circuit court will be affirmed to the amount of eleven hundred dollars, with interest from the date of the deed. As to the excess, it will be reversed, and the complainant left to her remedy at law. The defendants are entitled to costs of this court.

The other justices concurred.

VENDOR AND PURCHASER.—NO VENDOR'S LIEN exists for the amount of damage sustained in the event of the failure of the vendee to perform the acts agreed by him to be done: *Parrish v. Hastings*, 102 Ala. 414, 48 Am. St. Rep. 50.

FRAUD—THIRD PERSON.—If false and fraudulent misrepresentations are made to one person with the expectation that they should be communicated to and acted upon by a third, and they are so communicated and acted upon to his prejudice, the party first making such representations is liable therefor: *Chubbuck v. Cleveland*, 37 Minn. 466, 5 Am. St. Rep. 864. See, also, the note to *Naah v. Minnesota etc. Co.*, 47 Am. St. Rep. 502.

TOLMAN v. WAITE.

[119 MICHIGAN, 341.]

TROVER—EFFECT OF JUDGMENT.—Mere rendition of a judgment for the plaintiff in trover does not operate to transfer to the defendant the title to the goods converted.

F. H. Abbott, for the appellant.

A. L. Flewelling, for the appellee.

³⁴¹ HOOKER, J. The facts in this case were stipulated, and a judgment was rendered for the plaintiff by the court, from which the defendant has appealed. Ball, as sheriff, seized, by virtue of a writ of attachment against Bannerman, at the suit of Fisher, personal property which in fact belonged to the plaintiff, who brought an action of trover therefor. Ball died during the pendency of the action. His death was suggested, and his administrator defended the action, which resulted in a judgment against the administrator for two hundred and seventy-five dollars, including damages and costs. Nothing was ever paid upon this judgment. On February 8, 1896, judgment was rendered for the plaintiff, Fisher, against Bannerman, the defendant in the attachment suit, and on February 16, 1897, an ³⁴² execution was issued. This was levied on the property attached, which had in the meantime been held under the attachment, and it was subsequently sold, to apply on the execution, by a deputy of the defendant, who had succeeded to the office of sheriff. The value of the property was two hundred dollars. The plaintiff then brought this action of trover for a conversion through the execution sale. The only question in the case is whether the title to the property passed from the plaintiff by virtue of the judgment against Ball's estate. Counsel for the defendant claims that a recovery in trover for the full value of the property operates to transfer the title, whether the judgment is satisfied or not. Counsel for the plaintiff insists that satisfaction of the judgment is a prerequisite.

We are of the opinion that the weight of authority in this country supports the plaintiff's contention, and that this court has not gone so far as to hold that the mere rendition of a judgment for the plaintiff in trover operates to transfer the title to the defendant: See note to Brady v. Whitney, 24 Mich. 154. In that case the court said that "the general rule is that a defendant in trover, against whom damages are given for

the full value of the property converted, gets title to the property, either by the judgment itself or by its payment." This is not an unambiguous statement, and, we think, cannot be said to hold that a mere judgment is sufficient. In *Kenyon v. Woodruff*, 33 Mich. 310, an execution had issued upon the judgment, and been levied upon property sufficient to satisfy the judgment. Under the circumstances of that case it was held that title passed, under the election of the plaintiff to look to the judgment debtor alone: Citing *Boardman v. Acer*, 13 Mich. 77, 87 Am. Dec. 736. This may properly be supposed to qualify the statement on page 315, viz.: "The recovery of *Schulenberg* against *Woodruff* for the conversion of the tables put an end to *Schulenberg's* right to reclaim them (*Brady v. Whitney*, 24 Mich. 154), and left them as the property of plaintiffs in error, at ³⁴³ whose instance and for whose sole benefit the conversion was brought about."

Furthermore, had the court considered *Brady v. Whitney*, 24 Mich. 154, to have held that the judgment was alone sufficient, it would have been unnecessary to consider the point on which the later case really turned.

In the present case no execution was issued. Counsel asserts that execution could not issue, and that certification to the probate court was equivalent thereto; but, as we do not find that the judgment was certified, there is no occasion to discuss the question.

The judgment is affirmed.

The other justices concurred.

TROVER.—A JUDGMENT in trover does not transfer the title to the property: *Gilman v. Gilby*, 8 N. Dak. 627, 73 Am. St. Rep. 791; *Miller v. Hyde*, 161 Mass. 472, 42 Am. St. Rep. 424, and see extended note thereto.

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BEITH v. PORTER.

[119 MICHIGAN, 365.]

EXECUTORS AND ADMINISTRATORS—RIGHT TO RECOVER PROPERTY FRAUDULENTLY CONVEYED.—Equitable assets, including land fraudulently conveyed, or held in trust for creditors, may be recovered by an administrator of the fraudulent grantor, and are assets in his hands for even an impartial distribution to the creditors.

CREDITORS' BILLS—LIEN OF.—The mere filing of a creditor's bill does not of itself give the complainant a lien upon the property as against the other creditors.

CREDITORS' BILLS—ABATEMENT BY DEATH.—The death of the debtor extinguishes the right of the creditor to prosecute a pending creditor's bill, when no lien exists.

W. E. Brown and O'B. J. Atkinson, for the appellant.

Stickney & Reed, for the appellee.

³⁶⁶ **HOOKEB, J.** The complainant, a judgment creditor of Jonathan Porter, filed the bill in this case to reach a parcel of land alleged to have been bought and paid for by Porter, but deeded to his wife, Jessie Porter, in fraud of the creditors of Jonathan Porter. Execution issued upon the judgment, and was returned unsatisfied, before the bill was filed. Jonathan Porter died soon after this suit was begun, and that fact is pleaded in abatement of the suit; and, upon the hearing upon bill and plea, the bill was dismissed, upon the authority of *German-American Seminary v. Saenger*, 66 Mich. 249. The complainant has appealed.

In the case cited, a bill was filed which, as to some of the property sought to be reached, was a judgment creditor's bill on return of execution nulla bona, and, as to other property, it was in aid of execution levied upon land. ³⁶⁷ So far as it was a bill in aid of execution, the court denied relief, upon the merits. The bill was dismissed upon the other branch of the case, upon the ground that: "When a man dies, all of his property not held by some definite lien is required by law to be applied ratably in payment of all his debts. . . . The statute does not, and the rules do not, declare any lien to be created by merely filing a creditor's bill. Until the debtor is enjoined from dealing with his property, there is nothing in the law to prevent any honest disposal of it; and, until a receiver is appointed, there is nothing which will act on the property itself. Except for the statute, a judgment creditor's bill is like any other

suit—a mere personal litigation. Until the assets are arrested and held in some way, the death of the defendant leaves them subject to administration. This doctrine was recognized from the beginning. In *Jones v. Smith*, Walk. Ch. 115, it was held that the death of the judgment debtor put an end to a creditor's bill, where no lien had attached. That must necessarily be so, because all unsecured creditors must stand on the same footing with each other. The authority of that case has never been doubted, and we think it is right."

In *Frost v. Atwood*, 73 Mich. 73, 16 Am. St. Rep. 560, it was said that "no rule is better settled than that liens can only be created by agreement, or by some fixed rule of law": See authorities there cited.

Counsel for the complainant contend: 1. That the present case is distinguishable from the cases cited; and 2. That, if thought otherwise, these cases should be overruled, because not in line with the general current of authority. They insist that the bill now before us is a bill in aid of execution, while counsel for the defendant insist that it is not. We think this question is of little importance, because, call it what we may, it is obvious that the proceeding was ineffective to create a lien or create a preference, within the rule laid down in the cases mentioned, no levy having been made, and the proceedings in the case having in no way placed the property in the custody of the court. If we are to construe those cases as ³⁰⁸ authority for the broad doctrine that all proceedings upon a creditor's bill abate upon the death of the debtor, except when execution has been levied, or the property taken in charge by the court, they are conclusive in this case, and only by overruling those cases can the bill be sustained.

The statute (2 Howell's Statutes, section 5884) authorizes and makes it the duty of administrators, when there is a deficiency of assets in the estate, to take steps to secure so much as shall be necessary to pay the debts of the estate, from any property which the deceased shall have conveyed in fraud of creditors. This statute has been before us in several cases, and it has been held that an administrator has no authority to act in such a case until a deficiency shall be shown, through the allowance of claims, which thereby become a charge upon the estate: *O'Connor v. Boylan*, 49 Mich. 213; *Kellogg v. Beeson*, 58 Mich. 340. And in a later case it is implied that the statute should be strictly construed, and that it does not apply to a case like the present, where the decedent never had title, but caused land for

which he paid the purchase price to be conveyed to a third person in fraud of creditors. The question was expressly reserved, however, and perhaps we should not treat it as a dictum even: *White v. Newhall*, 68 Mich. 646. The court said: "In this case there was no conveyance by the deceased, but the deed of the land sought to be subjected to the payment of his debts by this process was executed by a stranger to the defendant, and that, too, at a time when the deceased had no creditors who could complain of such a deed, even if the purchase money was furnished by the deceased, and not by the defendant. It certainly does not come within the strict letter of the statute. But it is not necessary in this case to pass upon this question." The case was disposed of upon the merits.

This statute was not in force when the case of *Jones v. Smith*, Walk. Ch. 115, was decided, and it was not alluded to in the later case of *German-American Seminary v. Saenger*, 66 Mich. 249; and we are not cited to any statute which authorized an executor or administrator to pursue property held ~~see~~ by strangers in fraud of the creditors of his intestate. We may, therefore, infer that the decisions in these cases were not based upon a statute, but upon the general rule that an administrator may pursue equitable assets, as well as legal, and that he may resort to a court of equity for the purpose. Such is manifestly the rule where there are outstanding equities that the deceased himself might have enforced. In those cases they may be enforced by the administrator for the benefit of distributees or creditors; and while there are no equities in the intestate or his personal representatives against one holding land in fraud of creditors, there are such in favor of creditors, and it is not certain that they could not be enforced by the administrator, in the absence of a statute authorizing it. If they could be, the statute referred to is declaratory of the common law, though, possibly, it may be said that it was intended to impose a duty upon the administrator, or to emphasize one already existing. The authorities indicate that proceedings to recover property held in fraud of creditors might be prosecuted by the administrator at the common law.

The right of an executor to administer equitable assets is shown in 3 *Williams on Executors*, 1545; and while a distinction may be drawn between equities which inure to the benefit of the estate, and the equities of creditors in lands held in fraud of creditors, the authority last cited indicates that property assigned in fraud of creditors is an asset in the hands of the execo-

utor: 3 Williams on Executors, 1545. Schouler on Executors, section 220, states the rule thus: "Any gift, assignment, conveyance, or transfer of property within the statute of 13 Elizabeth, chapter 5, and analogous legislation, is void against creditors, and consequently it becomes the duty of a personal representative to procure the property by instituting, on their behalf, appropriate proceedings, considering the means of litigation at his disposal and the proof obtainable. . . . Generally speaking, property which has been assigned or conveyed by the deceased, after the manner ³⁷⁰ of a gift, confers a title upon the donee or grantee, subject to the demands of prior existing creditors of the estate. The executor or administrator, representing these and other interests, against the express or implied wishes of the deceased himself, if need be, may procure all assets suitable for discharging demands of this character. . . . The personal representative's right and duty to have a fraudulent transfer set aside may extend to proceedings by bill in equity to reach real estate thus fraudulently conveyed, so far, at least, as the interests of creditors may require real property to be reached for the satisfaction of debts," etc. A reference to this subject will also be found in 7 American and English Encyclopedia of Law, 281.

The same authors indicate plainly that equitable assets in the hands of an administrator should be fairly and evenly distributed among creditors; and in 3 Williams on Executors, at page 1546, it is intimated that, upon a bill filed by a creditor of a deceased person, justice should be done to all creditors, without any distinction or priority: Schouler on Executors, secs. 220, 221.

Whether an administrator may proceed in equity to set aside fraudulent conveyances, or to enforce resulting trusts, has been a disputed question. An extended discussion of the subject will be found in the notes to *Sexton v. Wheaton*, 1 Am. Lead. Cas. 43, 46, et seq.; *Welsh v. Welsh*, 105 Mass. 229; *Blake v. Blake*, 53 Miss. 193, and cases cited. Many of the cases dealing with questions of this kind arise upon statutes, and therefore do not afford much light on the common-law rule.

The question seems to be settled for Michigan in the two cases cited. They, inferentially at least, hold that equitable assets including land fraudulently conveyed, or held in trust for creditors, may be recovered by the administrator, and are assets in his hands, and that the equitable rule of even and impartial distribution should be followed. The statute does not militate

against this rule, unless we are to say it should be strictly construed, and therefore limits it. This statute is not in derogation of ³⁷¹ the common law; it rather emphasizes its principles; and therefore there is no occasion to apply the rule that "statutes in derogation of the common law should be strictly construed," but there is every reason to construe it liberally. We are therefore of the opinion that the administrator may file a bill to reach property under circumstances such as exist in this case. This being so, it only remains to determine whether the Michigan cases should be overruled.

The case of *German-American Seminary v. Saenger*, 66 Mich. 249, is probably at variance with the weight of authority, for it is commonly held that the filing of a bill creates a lien as against other creditors, upon the property described in the bill, as will be seen by a perusal of the many cases cited in the brief of counsel for the complainant. We quote from a few of them. In *Stix v. Chaytor*, 55 Ark. 122, it was said: "The filing of this complaint, and service of the summons issued upon it, created a lien in favor of the plaintiffs on so much of the merchandise . . . as was then in existence." In *Davidson v. Burke*, 143 Ill. 148, 36 Am. St. Rep. 367, it is said: "The filing of a creditor's bill, and the service of process, create a lien in equity upon the effects of the judgment debtor": See, also, *First Nat. Bank v. Gage*, 93 Ill. 172; *King v. Goodwin*, 130 Ill. 108, 17 Am. St. Rep. 277, and cases cited. In *Newdigate v. Jacobs*, 9 Dana, 17, it was held that "the filing of the bill, or at least the service of the process upon it, gives the complainant a lien on the property, by placing it under control of the court." The same rule obtains in New York: *M'Dermutt v. Strong*, 4 Johns. Ch. 687. In *Beck v. Burdett*, 1 Paige, 309, 19 Am. Dec. 436, it is said: "In all these cases, where the property is not liable to an execution at law, the plaintiff obtains no lien upon the property or fund by the issuing or return of the execution. But it is the filing of the bill in equity, after the return of the execution at law, which gives to the plaintiff a specific lien": ³⁷² See, also, *Brown v. Nichols*, 42 N. Y. 26.

In *Bridgman v. McKissick*, 15 Iowa, 260, it was held that "a junior judgment creditor, by first instituting equitable proceedings to subject the property to the payment of his debt, acquires a priority of lien over a senior judgment creditor who is less diligent": See, also, *Cincinnati v. Hafer*, 49 Ohio St. 60. In *Freedman's etc. Trust Co. v. Earle*, 110 U. S. 710, the supreme court of the United States enunciates the same doctrine.

This doctrine is clearly at variance with the Michigan cases cited, as the underlying principle upon which those cases rest is that no lien arises upon the filing of the bill until the court takes possession or control of the property by virtue of its appointment of a receiver or the issuance of an injunction, and until one of these things happens, or a lien is created through a levy or in some other way, the owner is at liberty to sell the property. If this principle stands, it must be fatal to a bill filed under any circumstances, when the relief sought depends upon the existence of a lien. In the case of *German-American Seminary v. Saenger*, 66 Mich. 249, the suit abated, because it appeared that the property involved was by law made subject to administration. By the death of the original defendant, the administrator became vested with authority to acquire the property upon certain contingencies, to the exclusion of the creditor, to the end that it might be equitably distributed. It is difficult to avoid the conclusion that the two cases cited proceeded upon the theory that it is the policy of the law of this state to require all of the unsecured creditors of a decedent to submit to an equal distribution of his estate, equitable as well as legal—a conclusion that the statute (2 Howell's Statutes, section 5902) which prohibits levies of execution until after the expiration of the period allowed for the payment of debts against the estate tends to support. If this theory should be applied in a case where a debtor has deeded his property in fraud of creditors, there is little justice in refusing to apply it in ³⁷³ a case where he paid the consideration for property, and had the title made to his wife or friend. No equitable reason occurs to us why the former should be administered and distributed equally that does not apply with equal force to the latter, and we are therefore not satisfied that the Michigan cases should be overruled. Their doctrine has been the settled rule in Michigan for over fifty years, and we think there is no such emergency as to require its abrogation. Under the Michigan cases, the death of a debtor seems to extinguish, or at least suspend, the right of the creditor to prosecute a pending creditor's bill, when no lien exists.

The decree of the circuit court is affirmed, with costs.

The other justices concurred.

CREDITOR'S BILL—LIEN OF.—The filing of a creditor's bill and the service of process thereon create a lien on the equitable assets of the judgment creditor: *King v. Goodwin*, 130 Ill. 102, 17 Am. St. Rep. 277. See, also, *First Nat. Bank v. Shuler*, 158 N. Y. 168,

60 Am. St. Rep. 601; Senter v. Williams, 61 Ark. 180, 54 Am. St. Rep. 200; Davidson v. Burke, 143 Ill. 139, 36 Am. St. Rep. 367.

CREDITOR'S BILL—LIEN OF—DEATH OF DEBTOR.—The lien acquired by the filing of a creditor's bill is not defeated by the death of the debtor before judgment: *First Nat. Bank v. Shuler*, 153 N. Y. 163, 60 Am. St. Rep. 601.

FRAUDULENT CONVEYANCES.—THE EXECUTOR or administrator represents the creditors as well as the estate, and may sue for property fraudulently alienated by the deceased in his lifetime: *Note to Ohm v. Superior Court*, 20 Am. St. Rep. 248. But see the extended note to *Whitworth v. Thomas*, 8 Am. St. Rep. 740.

PEOPLE v. MENDENHALL.

[119 MICHIGAN, 404.]

BIGAMY—SECOND COMMON-LAW MARRIAGE.—A person who, being married, contracts a common-law marriage lacking the formalities prescribed by statute for the solemnization of marriages, is guilty of bigamy.

MARRIAGE IN FACT MAY BE SHOWN by proof of an agreement between two persons of opposite sex to take each other presently as husband and wife, consummated by cohabitation.

J. F. Henigan, for the appellant.

H. M. Oren, attorney general, and C. H. Smith, prosecuting attorney, for the people.

⁴⁰⁴ **MONTGOMERY, J.** The respondent was convicted of the crime of bigamy. The only substantial question raised is whether the offense is committed by one who, being married, contracts a common-law marriage lacking the formalities which the statute prescribes for the solemnization of marriages. The testimony on the part of the people tended to show that the respondent and the complaining witness, Bertha A. Poyle, entered into an agreement in writing as follows:

"I, Augustus C. Mendenhall, do hereby solemnly agree to take Bertha A. Poyle as my wedded wife, to live together in the holy estate of matrimony, to love her, comfort her, honor and keep her, in sickness and in health, and, forsaking all others, keep her only, so long as we both do live.

"I, Bertha A. Poyle, do hereby solemnly promise to take Augustus C. Mendenhall as my wedded husband, to live together in the holy estate of matrimony, to love, honor, comfort, and keep him, in sickness and in health, ⁴⁰⁵ and, forsaking all others, keep him only, so long as we both do live.

"AUGUSTUS C. MENDENHALL.
"BERTHA A. POYLE."

It was shown that this agreement was signed in the presence of witnesses; and that, acting on this agreement, the parties immediately commenced to cohabit as husband and wife, and continued to so cohabit for some weeks, when the complaining witness learned of the former marriage of the respondent.

The circuit judge charged the jury: "If you find from the evidence, and beyond a reasonable doubt, that Bertha Poyle entered into the contract in question in good faith, for the purpose of creating the marriage relation between her and Mendenhall, and not for the purpose of establishing or covering up unlawful sexual intercourse between them, and that she did this without knowledge or information that Mendenhall had a prior wife living, from whom he was not divorced, and that the marriage contract so entered into was followed by marital cohabitation, submitted to by her in good faith, supposing she was his lawful wife by virtue of such contract, then you should regard the second marriage charged in the information as sufficiently proven; otherwise, you should not."

The respondent's counsel stated his claim as follows: "The presumption of a valid marriage from the circumstances of cohabitation and the declaration of the parties, while it may be conclusive where there is no impediment in the way, yet we apprehend that where, as in this case, there is an impediment, to wit, a first marriage, and that impediment is proven, what is at most lewd and meretricious cohabitation cannot, by a humane presumption of the law, be converted into a predicate for the second marriage required under the statute of bigamy."

It is a settled rule in this state that a marriage in fact may be shown by proof of an agreement between two persons of opposite sex to take each other presently as husband and wife, consummated by cohabitation: *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *Clancy v. Clancy*, 406 Mich. 202; *People v. Loomis*, 106 Mich. 250. It follows that such informal agreement constitutes a marrying, within the meaning of section 9280 of 2 Howell's Statutes. It is none the less a marrying because one spouse is already married. It is true of every case of a bigamous marriage that the second marriage is void; and, as was said in *People v. Brown*, 34 Mich. 339, 22 Am. Rep. 531, it is the entering into a void marriage while a valid marriage exists which the statute punishes. In *Bishop on Statutory Crimes*, section 592, it is said: "In a state where mutual consent alone constitutes matrimony, as with the first marriage, so

with the second—no added formalities need be shown”: See, also, *Hayes v. People*, 25 N. Y. 390, 83 Am. Dec. 364.

The conviction is affirmed.

The other justices concurred.

MARRIAGE, INFORMAL.—Statutory provisions concerning the solemnization of marriage are generally deemed directory merely. Hence, the marriage of two persons effected by written contract and without any other solemnization, but followed by the assumption of marital rights and obligations, is valid: *State v. Zichfeld*, 23 Nev. 304, 62 Am. St. Rep. 800.

BIGAMY—VOID MARRIAGE.—It is no defense in a prosecution for bigamy that the second marriage is void for other reasons than that it is bigamous: Extended note to *State v. Johnson*, 93 Am. Dec. 252. On the proof of marriage in prosecutions for bigamy, see the extended note to *Hiller v. People*, 47 Am. St. Rep. 228-232.

L'ANSE v. FIRE ASSOCIATION OF PHILADELPHIA.

[119 MICHIGAN, 427.]

INSURANCE—FIRE—LOCATION OF PROPERTY.—Under a fire insurance policy on a fire-engine, hose, and hose-cart, while located and contained in the fire-engine house and “not elsewhere,” no recovery can be had for the loss of such property while it is being used in an attempt to extinguish a fire several hundred feet from the fire-engine house.

P. R. McKernan and F. E. Robson, for the appellant.

Gray & Looney, for the appellees.

⁴²⁷ LONG, J. On April 9, 1896, the defendant issued its policy of insurance to the plaintiff for the term of one year from April 19, 1896. The policy provides that the association does—

“Insure village of L’Anse . . . against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding \$1,500, to the following described property, while located and contained as described herein, and not elsewhere, to wit:

“\$400—On the two-story frame, shingled roof, fire-engine house, situate detached 70 feet, in the village of L’Anse, Baraga county, Michigan.

⁴²⁸ “\$700—On steam fire-engine and heater attached.

“\$200—On hose and hose-pipe.

"\$300—On hose-cart, tools and machinery not enumerated—all contained in above-described building.

"\$1,500—Other concurrent insurance noted."

Then follows the usual Michigan form of standard policy.

On May 9, 1896, the said steam fire-engine, hose, hose-pipe, and hose-cart, as covered by the policy, were burned and destroyed by fire. None of the above property was in the building at the time it was burned, but was being used in an attempt to extinguish a fire some two hundred to eight hundred feet from the building. The defendant refused to pay the damages claimed by the plaintiff for the loss of the property, on the ground that, under the policy, it was insured only while contained in the building mentioned and described in the policy, and not elsewhere. The action brought to recover on the policy was tried before the court without a jury, and the court found in favor of defendant's contention, and thereupon entered judgment in its favor. Plaintiff brings error.

It is admitted by counsel for plaintiff that the case involves but the one question: What is the proper construction of the words in the policy, "While located and contained as described herein, and not elsewhere"? It is argued by counsel that the usual purpose and use by the plaintiff of a fire-engine, hose, hose-cart, and other appliances described in the policy would be to extinguish fires in the village, and that, in order to be so used, it would be, as occasion might require, temporarily out of the engine-house, which would be its place of deposit when not in use; that such use must have been contemplated by both parties to the contract; and that such use must be presumed to have been taken into consideration by the defendant in fixing the rate of premium. It is said by counsel that the words "contained in," etc., and like expressions, were in use before the adoption of the standard form of policy, and had a well-settled meaning, and, if ⁴²⁹ applied to property the natural use of which required it to be kept in one place, the insurance was lost if the property was removed to some other place, but if, however, the property was of a sort that the natural use of it required a temporary removal from the place designated in the policy, and while so temporarily absent was destroyed, it was covered by the policy; that the words "contained in," etc., were of further description, and indicated the place of deposit when the property was not temporarily absent. It is therefore contended that, in framing the standard policy, the intention was to express and adopt this construction. On the other hand, counsel for the defendant claim that, even under the old forms of policy, the

with the second—no added formalities need be shown”: See, also, *Hayes v. People*, 25 N. Y. 390, 82 Am. Dec. 364.

The conviction is affirmed.

The other justices concurred.

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BIGAMY—VOID MARRIAGE.—It is no defense in a prosecution for bigamy that the second marriage is void for other reasons than that it is bigamous: Extended note to *State v. Johnson*, 98 Am. Dec. 252. On the proof of marriage in prosecutions for bigamy, see the extended note to *Hiller v. People*, 47 Am. St. Rep. 228-232.

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P. R. McKernan and F. E. Robson, for the appellant.

Gray & Looney, for the appellee.

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It is admitted by counsel for plaintiff that the case involves but the one question: What is the proper construction of the words in the policy, "While located and contained as described herein, and not elsewhere"? It is argued by counsel that the usual purpose and use by the plaintiff of a fire-engine, hose, hose-cart, and other appliances described in the policy would be to extinguish fires in the village, and that, in order to be so used, it would be, as occasion might require, temporarily out of the engine-house, which would be its place of deposit when not in use; that such use must have been contemplated by both parties to the contract; and that such use must be presumed to have been taken into consideration by the defendant in fixing the rate of premium. It is said by counsel that the words "contained in," etc., and like expressions, were in use before the adoption of the standard form of policy, and had a well-settled meaning, and, if ⁴²⁰ applied to property the natural use of which required it to be kept in one place, the insurance was lost if the property was removed to some other place, but if, however, the property was of a sort that the natural use of it required a temporary removal from the place designated in the policy, and while so temporarily absent was destroyed, it was covered by the policy; that the words "contained in," etc., were of further description, and indicated the place of deposit when the property was not temporarily absent. It is therefore contended that, in framing the standard policy, the intention was to express and adopt this construction. On the other hand, counsel for the defendant claim that, even under the old forms of policy, the

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BIGAMY—VOID MARRIAGE.—It is no defense in a prosecution for bigamy that the second marriage is void for other reasons than that it is bigamous: Extended note to *State v. Johnson*, 98 Am. Dec. 252. On the proof of marriage in prosecutions for bigamy, see the extended note to *Hiller v. People*, 47 Am. St. Rep. 228-232.

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The conviction is affirmed.

The other justices concurred.

MARRIAGE, INFORMAL.—Statutory provisions concerning the solemnization of marriage are generally deemed directory merely. Hence, the marriage of two persons effected by written contract and without any other solemnization, but followed by the assumption of marital rights and obligations, is valid: *State v. Zichfeld*, 28 Nev. 304, 62 Am. St. Rep. 800.

BIGAMY—VOID MARRIAGE.—It is no defense in a prosecution for bigamy that the second marriage is void for other reasons than that it is bigamous: Extended note to *State v. Johnson*, 98 Am. Dec. 252. On the proof of marriage in prosecutions for bigamy, see the extended note to *Hill v. People*, 47 Am. St. Rep. 228-232.

L'ANSE v. FIRE ASSOCIATION OF PHILADELPHIA.

[119 MICHIGAN, 427.]

INSURANCE—FIRE—LOCATION OF PROPERTY.—Under a fire insurance policy on a fire-engine, hose, and hose-cart, while located and contained in the fire-engine house and "not elsewhere," no recovery can be had for the loss of such property while it is being used in an attempt to extinguish a fire several hundred feet from the fire-engine house.

P. R. McKernan and F. E. Robson, for the appellant.

Gray & Looney, for the appellee.

⁴²⁷ LONG, J. On April 9, 1896, the defendant issued its policy of insurance to the plaintiff for the term of one year from April 19, 1896. The policy provides that the association does—

"Insure village of L'Anse . . . against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding \$1,500, to the following described property, while located and contained as described herein, and not elsewhere, to wit:

"\$400—On the two-story frame, shingled roof, fire-engine house, situate detached 70 feet, in the village of L'Anse, Baraga county, Michigan.

⁴²⁸ "\$700—On steam fire-engine and heater attached.

"\$200—On hose and hose-pipe.

"\$300—On hose-cart, tools and machinery not enumerated—all contained in above-described building.

"\$1,500—Other concurrent insurance noted."

Then follows the usual Michigan form of standard policy.

On May 9, 1896, the said steam fire-engine, hose, hose-pipe, and hose-cart, as covered by the policy, were burned and destroyed by fire. None of the above property was in the building at the time it was burned, but was being used in an attempt to extinguish a fire some two hundred to eight hundred feet from the building. The defendant refused to pay the damages claimed by the plaintiff for the loss of the property, on the ground that, under the policy, it was insured only while contained in the building mentioned and described in the policy, and not elsewhere. The action brought to recover on the policy was tried before the court without a jury, and the court found in favor of defendant's contention, and thereupon entered judgment in its favor. Plaintiff brings error.

It is admitted by counsel for plaintiff that the case involves but the one question: What is the proper construction of the words in the policy, "While located and contained as described herein, and not elsewhere"? It is argued by counsel that the usual purpose and use by the plaintiff of a fire-engine, hose, hose-cart, and other appliances described in the policy would be to extinguish fires in the village, and that, in order to be so used, it would be, as occasion might require, temporarily out of the engine-house, which would be its place of deposit when not in use; that such use must have been contemplated by both parties to the contract; and that such use must be presumed to have been taken into consideration by the defendant in fixing the rate of premium. It is said by counsel that the words "contained in," etc., and like expressions, were in use before the adoption of the standard form of policy, and had a well-settled meaning, and, if ⁴²⁰ applied to property the natural use of which required it to be kept in one place, the insurance was lost if the property was removed to some other place, but if, however, the property was of a sort that the natural use of it required a temporary removal from the place designated in the policy, and while so temporarily absent was destroyed, it was covered by the policy; that the words "contained in," etc., were of further description, and indicated the place of deposit when the property was not temporarily absent. It is therefore contended that, in framing the standard policy, the intention was to express and adopt this construction. On the other hand, counsel for the defendant claim that, even under the old forms of policy, the

insurance did not continue while the property was removed from its place of deposit, where the limitations were as contained in this policy, to wit, "while located and contained as described herein, and not elsewhere."

We think the cases cited by counsel for plaintiff clearly distinguishable from the policy in suit. Here the words are plain and unambiguous, and are not susceptible of construction other than that which the words themselves import. "While located and contained as described herein, and not elsewhere," means that the policy covered the property only while in that particular building, and did not cover it while it was anywhere else.

In *Green v. Liverpool etc. Ins. Co.*, 91 Iowa, 615, the words of the policy were, "while contained in the two-story brick and frame dwelling-house," etc. The court, in speaking of other cases to which its attention had been called by counsel for plaintiff, said: "This contract is widely different from those in the cases cited. The evidence shows that the property was kept sometimes in the chapel and sometimes in the house, and parts of it used in both places; and if we assume that the parties, when making the contract, knew of this, we have additional reason for limiting the liability to losses while in the house. It is sufficient to say that the liability is thus limited, and the courts have no right to extend it." ⁴³⁰ This case was followed by *Lakings v. Phoenix Ins. Co.*, 94 Iowa, 476.

In *Bahr v. National Fire Ins. Co.*, 80 Hun, 309, the limitation in the policy was, "while located as described herein, and not elsewhere, to wit, . . . while contained in the frame building occupied as a wheelwright shop," etc. The carriage was burned in a livery-stable a block and a half away from there. Judgment for plaintiff was had below, and the court said: "This judgment cannot stand. The location of the insured property was a warranty, a breach of which avoided the policy."

This rule was recognized by this court in *Willey v. Farmers' Mut. Fire Ins. Co.*, 52 Mich. 446, and *English v. Franklin etc. Ins. Co.*, 55 Mich. 273, 54 Am. Rep. 377.

The court below was not in error in entering judgment in favor of defendant. That judgment must be affirmed.

The other justices concurred.

INSURANCE—LOCATION OF PROPERTY.—If personal property is insured "while contained in" a certain house, "and not elsewhere," and a loss thereof occurs at another place, the insurer is not liable: *British-American Assur. Co. v. Miller*, 91 Tex. 414, 66 Am. St. Rep. 901.

SKINNER v. MICHIGAN HOOP COMPANY.

[119 MICHIGAN, 467.]

SALES—FRAUDULENT PURCHASE—RETURN OF CONSIDERATION.—Plaintiff in replevin for goods fraudulently purchased need not tender back past due negotiable paper, provided it is made to appear that it is still held and owned by the payee, and not by a bona fide purchaser for value.

SALES—FRAUDULENT PURCHASE—GOODS IN TRANSIT.—A sale is not rendered fraudulent so as to entitle the seller to rescind, if the purchaser conceives the intention while the goods are in transitu of not paying for them.

SALES—SOLVENCY OF BUYER—REPRESENTATIONS.—A letter ordering goods to be shipped in carload lots, and agreeing to accept time drafts for the cost of filling the order and to send a check for the balance of the price when the car is unloaded is not a representation that the writer is solvent.

SALES—RESCISSIION.—A sale may be rescinded, and the property recovered, if the buyer, at the time of purchasing, was insolvent or in failing circumstances, and did not intend to pay for the goods, or had no reasonable expectation of doing so, and fraudulently misrepresented or concealed the facts.

Trask & Smith, for the appellants.

Snow & Snow and C. H. Gage, for the appellee.

⁴⁶⁷ HOOKER, J. In August, 1890, the Michigan Hoop Company, a corporation doing business at Saginaw, ⁴⁶⁸ agreed to sell, upon commission, all hoops consigned to it by the plaintiff. The parties dealt for a time under this agreement. On February 11, 1897, the defendant wrote the following letter to the plaintiff:

“Saginaw, Mich., February 11, 1897.

“Myron Skinner, West Point, Ky.

“Dear Sir: We have arranged for storage at Detroit, and can take a good many hoops, if you can buy them. We do not want many syrup hoops, but can take one or two cars. We want mostly pork and tierce hoops. We will pay the following prices: Syrups, \$7.00; pork, \$7.00; tierce, \$8.00 per M.; flour hoops, \$4.00. You make 30-day drafts for what you will have to pay for the hoops, and, as soon as the hoops are unloaded, we will send you check for the balance. Bill all cars via C. H. & D. and M. C., and send us shipping receipts for each car promptly. Load straight carloads as much as possible; however, you can load some mixed carloads if you wish. This will give you a chance to do some business, if you get out and hustle. There are a good many hoops being made now, and the market is dull,

but we think there will be a good trade during the summer. I inclose a letter, which you can show to people you wish to give drafts, which will help you some. Be sure and make all your billing as directed. Yours truly,

"MICHIGAN HOOP CO.,

"By E. W. TRAVER, Sec'y."

This paper accompanied the letter, and read as follows, viz.:

"Feb. 11, A. D. 1897.

"To Whom It may Concern:

"We will accept 30-day drafts drawn on us by M. Skinner, and made in payment for hoops.

"MICHIGAN HOOP CO.,

"By E. W. TRAVER, Sec'y."

The plaintiff testified to shipping several cars under this arrangement, and drew upon the defendant, but the drafts were not paid, and, upon learning that the defendant had failed, he replevied one carload of the hoops in Detroit. He replevied three carloads in Gladwin, but, being unable ^{too} to give the necessary bond, they were left in the custody of a transferee of the defendant. He subsequently replevied three carloads in Saginaw. These last are involved in this action and were worth five hundred and forty-four dollars. The defendant Robinson is cashier of a bank, and held a mortgage on the hoops and other property, in trust for certain creditors. It seems to be conceded that prior to February 11, 1897, the plaintiff had drawn and the hoop company had paid drafts to an amount exceeding eleven thousand dollars. The defendant claims that there was due to it upon these about eight thousand dollars on February 11th. This the plaintiff denied, claiming that from February, 1891, to a short time before February 11, 1897, he had bought hoops for the defendant in the capacity of agent, and that the eight thousand dollars was accounted for by losses through fire, theft, etc. Prior to the replevin of the hoops, and subsequent to February 11th, the plaintiff had drawn six drafts upon the hoop company. Four of these drafts were accepted by the hoop company, but were not paid by it when they matured. There was testimony tending to show that the defendant was hopelessly insolvent.

It is claimed that the court erred in refusing to direct a verdict for the defendants, inasmuch as it appeared that the plaintiff had not tendered back the unpaid drafts at the time of rescinding the contract. It was shown that the drafts were worthless, and that the plaintiff had at least three, if not all, of

the four accepted drafts with him at the time of the trial, and that none of them had been paid, except what he paid. These were filed with the court before judgment, one only—for eighty-seven dollars—of the accepted drafts not being produced and filed. This was some days after the trial. There were five carloads of the hoops which plaintiff did not succeed in replevying. The letter quoted shows the nature of the contract, and that the parties acted under it is undisputed. Several lots of hoops were shipped, and several drafts were drawn. The plain intent of the letter was that settlements should follow shipments, upon which money previously advanced should apply. ⁴⁷⁰ Therefore, if we were able to ascertain the dates of shipment of the lots replevied, we might be able to determine whether the eighty-seven dollar draft should or should not be treated as a payment upon such shipment. If not, we should think it unnecessary to show that such draft had been tendered or produced, because not a part of the consideration for the hoops replevied. But if, on the contrary, it was to be applied upon such shipment, and at the time of the trial was in the hands of a bona fide holder for value, the plaintiff would fail for not putting the defendant in statu quo. The acceptance would then be an outstanding obligation, against which the defendant would have no defense. But if, like the others, it was in the hands of, and owned by, the plaintiff, its production upon the trial and deposit with the court would protect the defendant, and it would be governed by the same rule as though it were a promissory note. In the case of *Nichols v. Michael*, 23 N. Y. 273, 80 Am. Dec. 259, it was held that restoration of such a note was unnecessary, because, the moment the contract was rescinded, the note in the hands of the plaintiff became invalid and worthless. It was held in such case that the surrender of the note to the court upon the trial would be sufficient.

Several cases of our own seem to recognize the rule of the New York case. *Dayton v. Monroe*, 47 Mich. 193, was the case of a note, though the action differed in its nature. The case of *Waterbury v. Andrews*, 67 Mich. 287, holds that a void note need not be restored. In *Stubly v. Beachboard*, 68 Mich. 414, it was held that the note of a third person need not be surrendered before suit; and in *Pangborn v. Ruemenapp*, 74 Mich. 572, a tender of a worthless note upon the trial was held sufficient. While we think that such surrender might be necessary, either at the time of rescission, or, at all events, upon the trial, in the case of negotiable paper of the defendant, not due, it would

seem to be unnecessary where it was overdue, provided it should be made to appear that it was still held and owned by the payee, and not by a bona fide purchaser ⁴⁷¹ for value: *Sisson v. Hill*, 18 R. I. 212. We are unable to tell from this record whether the plaintiff had all of the accepted drafts or not. He says in his testimony that he had these drafts in his pocket at the trial, but the brief of his counsel indicates that one had been negotiated and was still outstanding. The case need not turn upon this point, however.

The judge charged the jury that: "If, after ordering the goods, and while they were in transit, the defendant hoop company conceived the intention of not paying for the property, and took the property at Detroit with the design to transfer it to other creditors, and not pay the plaintiff for the goods, and that intention continued up to the time of the seizure of the goods by the plaintiff on his writ, the plaintiff would be entitled to rescind the sale and recover the property."

We are of the opinion that this extends the rule. The delivery was complete when the hoops were put in the hands of the carrier, and the title then passed to the defendant, and would not be divested by a subsequent change of purpose. This question has been recently decided in Iowa in the case of *Starr v. Stevenson*, 91 Iowa, 684. It is there pointed out that the supposed analogy between "rescission" and "stoppage in transitu" does not exist.

We are also of the opinion that the court should not have said that: "If, at the time of making the contract, the buyers asserted themselves to be solvent, and were in fact insolvent, . . . the intention not to pay will be presumed from their condition; and a purchaser's knowledge that he will not be able to pay for goods bought on credit is equivalent to an intention not to pay." The letter should not have been construed to contain a representation of solvency.

The court also instructed the jury that: "Where a buyer is insolvent at the time of making the contract of sale, or is in failing circumstances, and conceived the intention of not paying for the goods, or had no ⁴⁷² reasonable expectation that he could do so, and fraudulently concealed or misrepresented the facts, the sale may be rescinded by the seller, and the property recovered." We think there was no error in this: *Belding v. Frankland*, 8 Lea, 67, 41 Am. Rep. 633, note; *Davis v. Stewart*, 8 Fed. Rep. 803.

In *Le Grand v. Eufaula Nat. Bank*, 81 Ala. 123, 60 Am. Rep. 140, the rule is laid down that, to authorize disaffirmance of a sale, the concurrence of three facts must be shown: 1. The purchaser must have been insolvent, or in failing circumstances; 2. He must have had at the time a preconceived intention not to pay for the goods, or no reasonable expectation of being able to do so; 3. There must have been on his part an intentional concealment of these facts, or a fraudulent representation in reference to them.

Without saying that a man must always be insolvent, or in failing circumstances, to authorize rescission, we think the charge complained of was in accord with the rule there laid down, which was applicable to the facts in this case.

The judgment is reversed and a new trial ordered.

The other justices concurred.

SALES—RESCISSION.—A vendor to whom a vendee has given his promissory note for goods is not bound to tender such note at the time of rescinding the contract; it is sufficient if he produces it upon the trial and delivers it into the custody of the court: *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 259, and note. Compare *Wilcox v. San Jose etc. Co.*, 113 Ala. 519, 59 Am. St. Rep. 185, and note thereto.

SALES—RESCISSION.—A vendor induced by misrepresentation or fraudulent concealment to sell goods to a purchaser who is insolvent and has no intention to pay for them, may disaffirm the sale, and reclaim the goods as against the vendee or any person claiming under him with notice: See extended note to *Reid v. Cowduroy*, 18 Am. St. Rep. 362.

SALES—RESCISSION.—In order to avoid a sale as fraudulent, the fraud must have existed when the goods were sold: See monographic note to *Reid v. Cowduroy*, 18 Am. St. Rep. 363.

PETIT v. FLINT & PERE MARQUETTE RAILROAD CO.

[119 MICHIGAN, 402.]

ESTOPPEL—TITLE TO LAND.—Plaintiff's title in an action of ejectment is not defeated by evidence that the executors of his ancestor conveyed the premises, received full value therefor, and that the money was disbursed for the benefit of the heirs, including plaintiff.

EJECTMENT—IMPROVEMENTS.—GOOD FAITH OCCUPANCY, accompanied by color of title entitling the defendant in ejectment to recover compensation for improvements in case of plaintiff's recovery means simply an honest belief of the occupant in his right or title, and the fact that diligence might have shown him that he had no title does not necessarily negative good faith in his occupancy.

EJECTMENT—VALUE OF IMPROVEMENTS—HOW ESTIMATED.—The value of improvements to which a good faith occupant is entitled upon ejectment is to be determined by the actual relative value of the land with or without the improvements, and not by their cost or peculiar value to the occupant, or what they may be worth to the plaintiff for the purposes to which he intends to devote the property.

DEEDS—COLOR OF TITLE.—The fact that a deed to premises limits their use to a particular purpose does not prevent it from constituting color of title in ejectment.

B. Hanchett and Atkinson & Wolcott, for the appellant.

N. E. Thomas and H. W. Stevens, for the appellee.

⁴⁰³ **MONTGOMERY, J.** This case has once been before this court: See *Petit v. Flint etc. R. R. Co.*, 114 Mich. 362. On the former hearing the questions which relate to the plaintiff's title were dealt with, and the conclusion reached that the plaintiff had shown title to an undivided one-fourth of the premises in dispute, and that, on the record there presented, no estoppel was shown. After the case was remanded, the defendant was permitted to amend its plea by adding thereto a claim for improvements. The case has been retried, resulting in a judgment for plaintiff, based on a verdict directed by the court, and defendant has brought error.

On the second trial the evidence was not essentially different from that which was offered on the first, in so far as it was directed to establish title.

Defendant offered testimony to show that the executors of Edward Petit received full value for the premises, and that the money so received was disbursed for the benefit of the heirs, including plaintiff. This testimony was offered for the purpose of showing an estoppel. The court rightly held that this testimony was not available to defeat plaintiff's title in an action of ejectment: *Hayes v. Livingston*, 34 Mich. 387, 22 Am. Rep. 533; *Huyck v. Bailey*, 100 Mich. 223; *Penfold v. Warner*, 96 Mich. 179, 35 Am. St. Rep. 591.

The principal question presented on this record is whether the circuit judge was right in refusing to submit to the jury the question of the increased value of the land by reason of the improvements. Plaintiff seeks to sustain ⁴⁰⁴ this ruling on two grounds: 1. That as the will under which the executors attempted to convey did not, as a matter of law, authorize the conveyance, the defendant was bound to know that fact, and cannot be deemed a good faith occupant; and 2. That the evidence fails to show that the improvements placed upon the land were

of any value to the land, disconnected from their use in connection with defendant's railroad. We think neither proposition tenable. The statute (3 Howell's Statutes, section 7836) affirms an equitable right, and should receive no technical construction which will interfere with the purpose aimed at. The good faith intended by this statute means honest belief of the occupant in his right or title, and there was testimony in this case tending to show that the agents of defendant acted in good faith in entering into and retaining possession. The fact that diligence might have shown defendant that it had no title does not necessarily negative good faith: *Griswold v. Bragg*, 19 Blatchf. 94; *Canal Bank v. Hudson*, 111 U. S. 66; *Cole v. Johnson*, 53 Miss. 94; *Rawson v. Fox*, 65 Ill. 200.

The evidence tends to show that the land is more valuable to sell with the improvements placed thereon by the defendant than it would have been had no such improvements been made. Possibly, the testimony is not conclusive on this point, but such is the tendency of some of the testimony. We think this must be the test under this statute—the actual relative value of the land with or without the improvements. On the one hand, because structures had been erected or placed upon the land which cost the defendant money, and which are of value to it, the plaintiff cannot be charged with this cost, or special, peculiar value to defendant, if the actual value of the premises has not been enhanced thereby. On the other hand, the defendant cannot be denied all relief under this remedial statute on the ground that the improvements are not adapted to the use to which the plaintiff may assert it to be his intention to devote the property upon recovering it.

⁴⁰⁵ The fact that, by the terms of the deed under which the defendant held, the use of the premises was limited to a particular purpose, does not prevent the deed's constituting color of title.

The judgment will be reversed and a new trial ordered.

The other justices concurred.

JUDICIAL SALES—ESTOPPEL AGAINST HEIRS.—The heirs of a decedent who receive the proceeds of an administrator's sale of land, are estopped to deny the validity of the sale, even though it is so far void as to convey no title in law: *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584, 18 Am. St. Rep. 78. See, too, *Lewis v. Lichty*, 8 Wash. 213, 28 Am. St. Rep. 25; *Terrell v. Weymouth*, 32 Fla. 255, 37 Am. St. Rep. 94. However, in some jurisdictions an estoppel in pais cannot work a transfer of the legal title to land: *Hayes v. Livingston*, 34 Mich. 384, 22 Am. Rep. 533.

EJECTMENT—IMPROVEMENTS.—In an action for mesne profits against a bona fide possessor under claim of right, he should be allowed for improvements made by him to the extent that they have increased the value of the premises, and he is not restricted to the value of the improvements themselves: *Note to Barrett v. Stradl*, 9 Am. St. Rep. 805.

WILLIAMS v. McKEAND.

[119 MICHIGAN, 507.]

WILLS—RESIDUARY LEGATEE.—A devise to a son of "all the residue of the testator's real estate and personal property not hereinbefore enumerated, as hereinafter described," is a specific bequest of the subsequently enumerated property, and does not entitle the son to take as residuary legatee the lapsed legacies and property not enumerated in the bequest to him.

J. H. McDonald and A. & S. H. Perry, for the appellants.

Bowen, Douglas & Whiting, A. C. Baldwin, E. G. Stevenson, and J. H. Patterson, for the appellees.

508 MONTGOMERY, J. This bill was filed by the complainants, as executors of the last will and testament of Ferdinand Williams, deceased, late of Oakland county, Michigan, to obtain a construction of the will. The estate consists of about thirteen thousand four hundred dollars in cash, of household furniture, arms, stock and utensils on his farm, appraised at six hundred and ninety-two dollars, and of real estate consisting of his home farm, located in Oakland county, appraised at five thousand dollars, and of real estate (all vacant) located in the city of Detroit, appraised at about one hundred and fifteen thousand dollars. The will was drawn by the testator, a man of liberal education, but not versed in law. The first clause appoints the complainants executor and executrix. The second makes certain bequests, including a life estate in the home farm, and all stock and tools thereon, to the wife of the testator, on condition that the wife make and deliver a good and sufficient release of dower on the whole of the residue of the real estate of which the testator should die possessed. These were followed by various other specific bequests to the children, and then follows a bequest to Julien as follows:

509 "To my son Julien Williams, his heirs, executors, and assigns, I do give, devise, and bequeath all the residue of my

real estate and personal property not hereinbefore enumerated, as hereinafter described. [Here follows a description of lands.] I also give, devise, and bequeath to my son Julien Williams all my real estate in the township of Springwells, county of Wayne, state of Michigan, remaining after the aforesaid bequests, to wit: Lot number twelve (12) in the rear concession of private claim number thirty (30), also lot number thirty-seven (37), also lot number forty-seven (47), in said rear concession of private claim thirty (30), together with the rights, hereditaments, and appurtenances thereto belonging. Also I give to my son Julien my real estate in the county of St. Joseph, state of Michigan, to wit: Thirty-nine (39) acres of land adjacent to the village of Mottville, in said county and state, and also two blocks of lots, and three or four lots over and above said blocks, there pertain pertaining to me. I also give to my said son Julien all the arms of which I may die possessed, including guns, rifles, pistols, revolvers, etc. Also, I charge my said son Julien to pay out of his proper share, as herein set forth, all my debts and liabilities; also my necessary funeral charges."

This will was executed November 8, 1863. The testator survived until November 12, 1896. He survived his wife, who died April 29, 1892, and his son Saxton Cook Williams, who died February 20, 1893. The will, by its terms, disposed of substantially all the property which the testator had at its date, except the remainder in the farm after the life estate of the wife expired. Subsequently, the estate of the testator increased from forty thousand dollars to about one hundred and thirty-five thousand dollars, which was its value at the time of Mr. Williams' death. The question which arises for discussion is whether, under the last clause, Julien Williams is entitled to take as residuary legatee the lapsed legacies and property not specifically disposed of, or whether this clause is a specific bequest to him of enumerated property. The learned circuit judge adopted the latter construction, and from his decree complainants appeal.

The question is not free from difficulty. We are not cited to any cases precisely in point. We are cited to ⁵¹⁰ many cases in which a general residuary clause has been held effectual, although followed by enumeration of specific property less than the whole; but in most instances these cases have been determined by the terms of the will, which were held to manifest an intention of naming a residuary legatee. The rule that such a construction should be given as will, if possible, avoid intestacy,

is invoked; also, the rule that the will speaks from the time of the death of the testator; and undoubtedly the intention should be sought with both rules in mind, but neither rule should be so applied as to extend the force of terms which are obviously restricted: *Gold v. Judson*, 21 Conn. 622. The will in question exhibits on its face an intention to specifically describe the property which the testator intended to give to each beneficiary. The fact that all the real estate was carefully described indicates this; but what is more persuasive is that, when the bequest to Julien is reached, the first reference is to such property as has not been already enumerated, showing that the testator had before him a list of all of his property, or, at least, had it in mind. Having disposed of certain portions, he now proceeds to deal with what was remaining; and the conclusion is to our minds inevitable that he is attempting to deal, not with an uncertain holding, and that he did not have in mind after-acquired property, but he is still writing with the inventory before him. "All the residue of my real estate and personal property." That reference is to the definite property which he has in mind, and has started out to dispose of. He describes it, therefore, by ^{§11} excluding that which has been before enumerated, and describing specifically that which he intends to grant to Julien. The words which he employs are words of limitation and restriction,¹ and we think should be so construed. While, as before stated, no case "on all fours" is cited, we think the following cases give support to the view here expressed: *Quinn v. Hardenbrook*, 54 N. Y. 83; *Springett v. Jenings*, 6 Ch. App. 333; *Wheeler v. Brewster*, 68 Conn. 177.

In *Redfield on Wills*, in a note to page 110 of volume 2, the decision of the master of the rolls, Sir John Romilly, in *In re Kendalls' Trust*, 14 Beav. 608, is quoted, as follows: "As a general rule, I should consider that where a testator expresses that he gives to A everything he dies possessed of, and afterward enumerates what it is that he intends to give, the bequest would be confined to the specific enumeration"; and the learned author adds: "This, as it seems to us, brings this class of exceptions to one very intelligible point, and almost the only one to be extracted from the cases. How extensive its application may be is more questionable." If this test be applied to this case, we find that the construction contended for by the appellees must be adopted. Indeed, the case is stronger for the appellees than that put by the master of the rolls, in the language quoted; for in the present case the general words do not in terms extend

to any other than the property owned at the time of the execution of the will, and it is as clear as language can make the intent that there is an attempt to enumerate what it is that the testator intends to give. This intention is not manifested alone by the fact of the enumeration (as was the fact in many of the cases cited by appellants), but is made manifest by the words which precede the enumeration, "as hereinafter described."

The decree of the circuit court accords with the construction which we have given the will, and will be affirmed.

The other justices concurred.

LEGACY—RESIDUARY OR SPECIFIC.—A residuary legacy embraces only that which remains after all the bequests of the will are discharged; a specific legacy is one that can be separated from the body of the estate and pointed out so as to individualize it: Extended note to *Brill v. Wright*, 8 Am. St. Rep. 721. See, too, *In re Williams*, 112 Cal. 521, 53 Am. St. Rep. 224. Every gift of land, even as a general residuary devise, is specific: Extended note to *Walton v. Walton*, 11 Am. Dec. 469.

KEYES v. KONKEL.

[119 MICHIGAN, 550.]

REPLEVIN.—A HUMAN CORPSE IS NOT PROPERTY and an action of replevin will not lie for its return.

J. H. Davitt, for the appellants.

Harris & Kendrick, for the appellee.

550 MONTGOMERY, J. This is an action of replevin to recover the dead body of plaintiff's brother. The deceased died at a hospital, and defendants, who are undertakers, took charge of the corpse by request of the hospital authorities. The plaintiff, after the defendants had performed some services in fitting the body for burial, demanded possession of the body, and defendants refused to deliver the body up unless paid for their services. Thereupon plaintiff instituted this suit.

The question presented is whether replevin will lie in this state for a human corpse. The question is happily more novel than difficult. The statute (2 Howell's Statutes, section 6856) provides for the proceeding of replevin in justice's court, and requires an affidavit by the plaintiff setting forth that his "personal goods and chattels" have been unlawfully taken or are un-

lawfully detained. The ⁵⁵¹ replevin statutes (2 Howell's Statutes, sections 8346, 8347) provide for a judgment for defendant, when the plaintiff fails in his case, for a return of the property or for its value. It is apparent that no return of the property can be ordered in case of the replevin of a dead body, and it is equally true that its value in money can neither be appraised nor ascertained by a jury. It was formerly held in England that there could be no property in a human body: *Williams v. Williams*, L. R. 20 Ch. Div. 659, also reported in 21 Am. Law. Reg. 508; *Guthrie v. Weaver*, 1 Mo. App. 141; *Meagher v. Driscoll*, 99 Mass. 284, 96 Am. Dec. 759; *Pierce v. Proprietors etc.*, 10 R. I. 227, 14 Am. Rep. 667; *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465. In certain modern American cases, a dead body has been said to be a quasi property, and the right to control and bury it and to recover against one who mutilates the corpse has been maintained: *Pierce v. Proprietors etc.*, 10 R. I. 227, 14 Am. Rep. 667; *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *Burney v. Children's Hospital*, 169 Mass. 57, 61 Am. St. Rep. 273; *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370; *Foley v. Phelps*, 1 N. Y. App. Div. 551, 37 N. Y. Supp. 471. Recovery for the refusal of the right to bury or for mutilation of the body is rather based upon an infringement of a right than upon the notion that the property of plaintiff has been interfered with. The recovery in such cases is not for the damage to the corpse as property, but damage to the next of kin by infringement of his right to have the body delivered to him for burial without mutilation. In numerous cases equity has taken jurisdiction to prevent interference with the control of the dead body by persons entitled to control it: See *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *Pierce v. Proprietors etc.*, 10 R. I. 227, 14 Am. Rep. 667. And in *Regina v. Fox*, 2 Q. B. 246, the remedy by mandamus to a jailer was granted. But on every consideration we are of the opinion that replevin cannot be maintained.

It is not contended that the defendants are entitled to maintain a lien. It is obvious that return cannot be adjudged. ⁵⁵² The only proper judgment is one dismissing the proceeding, with costs of all the courts to the defendants. It is so ordered.

The other justices concurred.

Dead Bodies—Rights in and to, and the Remedies for Their Enforcement.

Right of Possession and Burial.—This is a live topic as far as litigation is concerned. At the common law there was no property in a human corpse. The whole matter of its burial, as well as the

custody of the body after burial, was within the exclusive cognizance of the church, and of the ecclesiastical courts. While it is still admitted that there is no property in the dead body of a human being, in the commercial sense of the term, yet those who are entitled to its possession and custody for the purpose of burial have legal rights in it which the law recognizes and protects, and any interference with such rights is an actionable wrong: *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370; *Pierce v. Proprietors etc.*, 10 R. L. 227, 14 Am. Rep. 667. A person may, by will, absolutely determine what disposition shall be made of his remains: *Scott v. Riley*, 16 Phila. 106. But when no such disposition is made of the dead body of a human being, it belongs to the surviving relatives, in the order of inheritance, like other property, and such relatives, and not the executor or administrator, have the right to the custody and burial thereof: *Benihan v. Wright*, 125 Ind. 536, 21 Am. St. Rep. 249; *Bogert v. Indianapolis*, 18 Ind. 184. Before the body of a deceased human being is buried, there is a right vested in the husband or wife or next of kin to possession for the purpose of burial or other legal disposition of it: *Burney v. Children's Hospital*, 169 Mass. 57, 61 Am. St. Rep. 273; *Weld v. Walker*, 180 Mass. 422, 89 Am. Rep. 465; *Foley v. Phelps*, 1 N. Y. App. Div. 551. As between relatives of the deceased, a widow, and not the next of kin, has the right to control the burial of her deceased husband, dependent, however, upon the peculiar circumstances of the case, or the waiver of such right by consent or otherwise: *Hackett v. Hackett*, 18 R. L. 155, 49 Am. St. Rep. 762. The widow has the right to the custody of the body of her deceased husband for the purpose of preservation, preparation, and burial, and may maintain an action against anyone who interferes therewith or mutilates or destroys it: *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370. It has been held that, although the widow has the right to bury her dead husband, she has no right to, or control over, the body after the interment, as the disposition of the remains of a deceased person after burial belongs exclusively to his next of kin: *Wynkoop v. Wynkoop*, 42 Pa. St. 293, 82 Am. Dec. 506, and extended note thereto on the subject now under consideration.

The husband is entitled to control the remains of his deceased wife, and he has a right to select the permanent place of burial of the body, and in the performance of such right and duty he should not be interfered with. Hence, if the husband, in accordance with the wishes of his deceased wife, places her body temporarily in the receiving vault of a cemetery, he cannot be enjoined, at the suit of the next of kin of the deceased, her brothers and sisters, from removing the remains for permanent burial in his own burial lot: *Johnston v. Marinus*, 18 Abb. N. C. 72. It is the duty, as well as the right, of the husband to bury the body of his deceased wife: *Garvey v. McCue*, 3 Redf. 315. Relatives of a deceased person have

the right to inter the body. This right having been exercised by the father, though against the husband's consent, or by the husband, though against the consent of the father, no right to the corpse remains, except to protect it from insult: *Guthrie v. Weaver*, 1 Mo. App. 136. Parents have the right to the possession of the body of their dead child and to bury it: *Renihan v. Wright*, 125 Ind. 536, 21 Am. St. Rep. 249.

Remedies.—The question as to the right to select the place of burial of a deceased must be solved upon equitable grounds; and while there is no property in the remains themselves, yet the person having charge thereof holds them as a sacred trust for the benefit of all who may, from family ties or friendship, have an interest in them. In case of a contention, the court should assume an equitable jurisdiction over the subject, somewhat in analogy to the care and custody of infants, and make such a disposition as should seem to be best and right under all of the circumstances: *Snyder v. Snyder*, 60 How. Pr. 368; *Pierce v. Proprietors etc.*, 10 B. L. 227, 14 Am. Rep. 667. A husband and wife may maintain an action against a third person and recover damages for a deprivation of the right to bury the body of their deceased child: *Renihan v. Wright*, 125 Ind. 536, 21 Am. St. Rep. 249. If a city ordinance requires a physician's certificate of the cause of death before burial of the body of a deceased person and the circumstances of death are such as to render a post mortem examination of the body necessary to enable the attending physician to certify the true cause of death, no action for damages can be maintained by the heirs of the deceased, either against the physician who made such examination in a proper manner or against the undertakers who had charge of the corpse for permitting such examination to be made: *Cook v. Walley*, 1 Colo. App. 163. Replevin does not lie for the return of a coffin containing a corpse: *Guthrie v. Weaver*, 1 Mo. App. 136.

Disinterment.—The unlawful disinterring of the body of a deceased human being is an indictable offense both at common law and under the statutes of the several states. It seems to make no difference for what purpose the body is disinterred, whether for dissection or otherwise, so long as the disinterment is unauthorized and done maliciously, without the consent of the deceased given in his lifetime, or of his near relatives given subsequently to his death: *State v. McClure*, 4 Blackf. 328; *McNamee v. People*, 31 Mich. 473; *Commonwealth v. Slack*, 19 Pick. 304; *Commonwealth v. Cooley*, 10 Pick. 37; *Commonwealth v. Loring*, 8 Pick. 370; *People v. Dalton*, 58 Cal. 226; *State v. Little*, 1 Vt. 331; *People v. Graves*, 5 Park C. C. 134; *Tate v. State*, 6 Blackf. 110; *State v. Pugsley*, 75 Iowa, 742; *Schneider v. State*, 40 Ohio St. 336. A person, without being actually present at the disinterment of a dead body unlawfully disturbed, may be found guilty of the offense, if, with the intention of giving assistance, he is near enough to afford it, should it be needed: *Tate v. State*, 6 Blackf. 110; *State v. Pugsley*, 75 Iowa,

742. In *Palmer v. Broder*, 78 Wis. 483, it appeared that a sister of the deceased, whose skull had been fractured, caused an inquest to be held for the purpose of ascertaining whether his death was caused by criminal means. At her request and under the direction of the coroner a surgeon made an autopsy at the tomb. He removed part of the skull and, after producing it at the inquest, retained it in his possession by direction of the coroner, and it was held that, under the circumstances, there could be no conviction of any of the interested parties of body stealing: *Palmer v. Broder*, 78 Wis. 483. A similar ruling was made under similar circumstances in *People v. Fitzgerald*, 105 N. Y. 146, 59 Am. Rep. 483. Trespass may be maintained and punitive damages recovered against a cemetery association for the disinterment of a deceased relative of the plaintiff in reckless disregard of the latter's right. In such case, if the trespass is willful, a verdict for one thousand dollars damages will not be disturbed: *Thirkfield v. Mountain View Cemetery Assn.*, 12 Utah, 76; *Jacobus v. Congregation etc.*, 107 Ga. 518, 73 Am. St. Rep. 141. If, in an action of trespass for entering a private burying ground and removing bodies therefrom, the defendants plead and prove that they were the owners of and in possession of the premises at and prior to the time of the alleged trespass, and that the bodies were disinterred in good faith, and with care and decency, the plaintiff is not entitled to recover: *Burham v. Loeb*, 107 Ala. 604; *Hamilton v. New Albany*, 80 Ind. 482. A dead human body becomes after burial a part of the ground to which it has been committed, and one who buries his dead in soil to which he has a freehold right, and to the possession of which he is entitled, can maintain an action of trespass *quare clausum fregit* against anyone who disinters the body or digs or disturbs the grave. And if one has been permitted to bury his dead in a public cemetery, by the express or implied consent of those in proper control of it, he acquires such a possession in the spot of ground in which the body is buried, as entitles him to maintain such action against the owner of the fee, or a stranger who, without his consent, negligently or wantonly disturbs it: *Bessemer Land etc. Co. v. Jenkins*, 111 Ala. 185, 56 Am. St. Rep. 26; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Page v. Symonds*, 63 N. H. 17, 56 Am. Rep. 490. In an action of trespass to recover damages for the unlawful disinterment of the body of plaintiff's child from its burial place, the injury to the natural feelings of the plaintiff may be considered by the jury in estimating the damages: *Bessemer Land etc. Co. v. Jenkins*, 111 Ala. 85, 56 Am. St. Rep. 26; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759.

The disinterment and removal of the remains of persons interred in a burial ground, without the consent of their next of kin, may be enjoined at the suit of such of the relatives of the deceased as have the right to inter in such ground: *First Presbyterian Church v. Second Presbyterian Church*, 2 Brewst. 372; *Price v. Methodist*

Episcopal Church, 4 Ohio, 515; Mitchell v. Thorne, 134 N. Y. 536, 30 Am. St. Rep. 699. It has, however, been held that the burial of relatives in the cemetery of a religious society confers no right or title upon the survivors, to enjoin the sale of such cemetery by the society and the disinterment and removal of the remains of the persons buried there, when such removal is in other respects conducted decently and according to law: Windt v. German Reformed Church, 4 Sand. Ch. 471.

Damages for Mutilation.—The person entitled to the custody and possession of a human body for the purposes of preservation and burial is entitled to recover damages from one who, unlawfully and without authority, mutilates such body: Larsen v. Chase, 47 Minn. 307, 28 Am. St. Rep. 370; Foley v. Phelps, 1 N. Y. App. Div. 551. Mental suffering is an element of the damages which may be recovered in such case, if it is the direct, proximate, and natural consequences of the act of mutilation: Larson v. Chase, 47 Minn. 307, 28 Am. St. Rep. 370; Foley v. Phelps, 1 N. Y. App. Div. 551. If a coroner is authorized to order an autopsy to be made on the body of the deceased to ascertain the cause of death without the consent of the family or next of kin of such deceased, neither the coroner acting in good faith, nor the physician who makes a post mortem examination in the usual manner, and upon the authority of such coroner, is liable in an action to the family or relatives of the deceased, for the mutilation of his body without their consent: Young v. College of Physicians, 81 Md. 353. In Griffith v. Charlotte etc. R. R. Co., 23 S. C. 25, 55 Am. Rep. 1, the doctrine of the common law that there could be no property in a dead human body was applied and it was there held that the administrator could not maintain an action to recover damages for the willful or negligent mutilation of the dead body of his intestate who had been murdered, and placed on defendant's railroad track and repeatedly run over by its cars. The court in this case, however, failed to decide what would be the rights of the next of kin under such circumstances.

Right of Removal.—If a husband consents to the burial of his wife in a lot owned by another person, but not with the intention or understanding that it should remain there permanently, a court of equity may permit him to remove her body to his own land, and may restrain any interference with such removal: Weld v. Walker, 130 Mass. 422, 39 Am. Rep. 465. A widow and not the next of kin has the right to remove the body of her deceased husband, after interment, to another place of sepulture, unless she has waived such right by consent or otherwise: Hackett v. Hackett, 18 R. I. 155, 49 Am. St. Rep. 762. In Wynkoop v. Wynkoop, 42 Pa. St. 293, 82 Am. Dec. 506, the right of the widow to remove the remains of her deceased husband from one cemetery to another after the first interment of his body, was denied, on the ground that the widow had no right to or control over the body of her deceased

husband after the interment. The disposition of his remains thereafter belongs exclusively to his next of kin in preference to the widow. If the husband, in accordance with the expressed wishes of his dead wife, expressed to him shortly before her death, places her corpse temporarily in the receiving vault of a cemetery, he cannot be enjoined, at the suit of the next of kin of the deceased, her brothers and sisters, from removing the remains for burial to his own lot: *Johnson v. Martinus*, 18 Abb. N. C. 72. The widow of a deceased husband is entitled to enjoin the removal of his remains by one of his children, contrary to her will, after she has properly buried such remains at her own expense: *Secord v. Secord*, 18 Abb. N. C. 78. In *Thompson v. Deeds*, 93 Iowa, 228, a father was, according to his wish, buried with his first wife and his daughter's husband, in a lot belonging to the daughter. The widow of such father, a second wife, desired to erect a monument to him upon such lot, and, upon being denied permission, threatened to remove the remains. An action to restrain such removal was brought, and the court held that such removal might be enjoined, that the widow had the right to erect the monument, with due regard to the plaintiff's daughter's right to use the remainder of the lot, but the monument to contain no reference to the daughter or to the daughter's husband. In such case, all of the kin of the deceased were given the privilege of decorating his grave with flowers without interference with each other. If a husband, with the full approval of his wife, is, after his death, buried by his father in the latter's cemetery lot, the widow may be enjoined from removing such deceased husband's remains: *Peters v. Peters*, 43 N. J. Eq. 140. If a father inters his deceased daughter in his cemetery lot with her husband's consent, the latter cannot afterward maintain an action of replevin for the coffin and contents in order to rebury them in his own lot: *Guthrie v. Weaver*, 1 Mo. App. 136.

The legislature has the right to authorize a municipal corporation to remove the remains of the dead from cemeteries. The right of burial in a churchyard is a privilege enjoyable only so long as the ground continues a churchyard and is subject to any right of the church to abandon it. One who is merely a pewholder or has relatives buried in the churchyard, and has no contract relation with the church, cannot maintain the objection that the statute authorizing the removal of the dead from such churchyard impairs the obligation of a contract: *Craig v. First Presbyterian Church*, 88 Pa. St. 42, 82 Am. Rep. 417. If the owner of land consents, either expressly or impliedly, to the interment of dead human bodies on his land, he has no right to afterward remove bodies so buried, or to deface or pull down gravestones or monuments erected to their memory: *State v. Wilson*, 94 N. C. 1015. Nor has a tomb owner the right to cause the removal of the remains of the dead, transferred from the place of first burial, and deposited by him in such tomb under his assurance, accepted by the relatives of the

deceased, and on the faith of which they permitted the transfer, that such remains should rest forever in such tomb: *Choppin v. Dauphin*, 48 La. Ann. 1217, 55 Am. St. Rep. 313. In such case, an injunction will lie to restrain the removal of the remains thus deposited in such tomb: *Choppin v. Dauphin*, 48 La. Ann. 1217, 55 Am. St. Rep. 313. A person's exclusive right to the possession of a spot of ground, in a public cemetery, in which his dead are buried, is limited to the time during which the ground is used for burial purposes, but, when the cemetery is discontinued, and the bodies are to be removed, notice should be given to the party entitled, if known, and it can be given, and if he fails to remove the remains, their removal by others must be done in a decent manner: *Bessemer Land etc. Co. v. Jenkins*, 111 Ala. 135, 56 Am. St. Rep. 26. If one has been permitted to bury his dead in a public cemetery by the express or implied consent of those in proper control of it, he acquires such a possession in the spot of ground in which the body is buried as will entitle him to maintain an action of trespass *quare clausum fregit* against the owners of the fee, or strangers or others who wantonly or negligently remove such body: *Bessemer Land etc. Co. v. Jenkins*, 111 Ala. 135, 56 Am. St. Rep. 26; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759. The right to bring an action to recover damages for unlawfully removing remains from a grave in a cemetery does not rest upon such facts as the erection of a headstone at the grave, putting turf about it, or the like, but upon the other and higher consideration of an easement or license: *Bessemer Land etc. Co. v. Jenkins*, 111 Ala. 135, 56 Am. St. Rep. 26; and in an action of trespass to recover damages for the unlawful removal of the remains of a human being from their burial place, the injury to the natural feelings of the plaintiff, the next of kin to the deceased, may be considered by the jury in estimating the damages: *Bessemer Land etc. Co. v. Jenkins*, 111 Ala. 135, 56 Am. St. Rep. 26; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Renihan v. Wright*, 125 Ind. 536, 21 Am. St. Rep. 249.

HOLMES v. McDONALD.

[119 MICHIGAN, 502.]

GIFTS INTER VIVOS—REVOCATION.—A recorded mortgage executed to a father by his son, providing for the payment by the son to the father of an annual sum during his life and thereafter of a specific sum to his daughter, who has knowledge of the gift, and that it is secured by mortgage, is a gift *inter vivos*, and cannot be revoked by the discharge of the mortgage by the father as fully paid and satisfied.

GIFTS INTER VIVOS.—TO CONSTITUTE a gift *inter vivos*, there must be a delivery of the thing given, either actual or constructive.

GIFTS TO BE VALID MUST BE EXECUTED, and there must be such delivery from the donor to the donee as places the property within the dominion and control of the latter, with intent to transfer the title to him.

GIFTS BENEFICIAL TO THE DONEE ARE PRESUMED to have been accepted.

GIFTS—DEEDS OF.—RECORDING a deed of gift with intent to pass title is a sufficient delivery.

T. A. E. & J. C. Weadock, for the appellants.

T. W. Atwood, for the appellee.

⁵⁰³ **LONG, J.** It appears that Alexander McDonald, in June, 1886, conveyed, by warranty deed, to his two sons, John and Donald, defendants here, certain lands in Tuscola county, and took back from them a mortgage on the land for three thousand dollars, conditioned as follows: "Provided always, and these presents are upon this express condition, that if the said parties of the first part shall and do well and truly pay, or cause to be paid, to the said party of the second part, the annual interest on the first day of September in each year, at six per cent per annum, on three thousand dollars, during the lifetime of ⁵⁰⁴ said Alexander McDonald, and, after his death, the sum of five hundred dollars to their sister, Jennie McDonald, then these presents shall cease and be null and void."

Jennie McDonald at this time was about fourteen years of age. The mortgage was duly recorded by Alexander McDonald, and payments of interest were made from time to time upon this mortgage, the principal payments being made by John. On October 9, 1889, a new arrangement was entered into, and Alexander McDonald discharged this mortgage of record, reciting in the discharge that the same had been fully paid and satisfied. John McDonald took a quitclaim deed from his brother, Donald, and his wife, and thereupon made and delivered to his father another mortgage to secure the payment annually of a sum equal to the annual interest on three thousand dollars, during the lifetime of the father, but without providing for the payment of the five hundred dollars to Jennie. This mortgage was duly recorded. At the time this last mortgage was made, Jennie had married Mr. Holmes. During the lifetime of Alexander, his son John continued to pay him the amounts specified in the mortgage. Alexander died in July, 1894, Jennie thereupon filed her bill to foreclose the first mortgage, claiming that there was due her thereunder the five hundred dollars, and that Alexander McDonald, her father, had no power to discharge

that mortgage and cut off this payment secured to her thereunder. The court below entered a decree of foreclosure, and found that the amount of five hundred dollars was due complainant, with interest at six per cent per annum from date of decree. From this decree, defendants appeal.

The court held that the case was ruled by *Love v. Francis*, 63 Mich. 181, 6 Am. St. Rep. 290, and that the recording of the mortgage providing for the payment to Jennie of five hundred dollars amounted to a gift inter vivos. Counsel for defendants say that "the question whether Alexander McDonald intended to give Jennie five hundred dollars absolutely, and that he did so, and she accepted it, answered in the affirmative, would bring this case within some of the rules laid ~~ses~~ down in *Love v. Francis*, 63 Mich. 181, 6 Am. St. Rep. 290, and, answered in the negative, should end the case"; but they contend that there never was any delivery to Jennie; that to contend that the recording of the mortgage was a constructive delivery will not do in this case, because Alexander discharged the mortgage, and delivered it up to the makers, and entered into a new arrangement; that there is no question but that Alexander intended, at the time of making the first mortgage, to provide five hundred dollars for Jennie, to be paid after his death; but that the means to effectuate that result he always retained, and, when conditions changed, he changed his mind, and that the gift which he had intended for her was never delivered, and never placed beyond the control of the donor.

To constitute a gift inter vivos, there must be a delivery of the thing given, either actual or constructive. It is not necessary that it be delivered to the person intended directly; it may be delivered to some person for him, or to a trustee for that purpose; but in all cases such a disposition of it must be made in favor of the donee as effectuates the object, and places the *jus disponendi* beyond the power of the donor to recall: *Love v. Francis*, 63 Mich. 181, 6 Am. St. Rep. 290. It is well settled that an intention to give, evidenced by a writing, may be most satisfactorily established, and yet the intended gift may fail because no delivery is proved: *Wadd v. Hazelton*, 137 N. Y. 215, 33 Am. St. Rep. 707. Another well-settled rule in relation to such gifts is that, to make them valid, the transfer must be executed, for the reason that, there being no consideration therefor, no action will lie to enforce it. To consummate such gift, there must be such a delivery from the donor to the donee as will place the property within the dominion and control of

the latter, with intent to transfer the title to him: *Gray v. Barton*, 55 N. Y. 72, 14 Am. Rep. 181.

But counsel for defendants contend that there is no evidence in the case that the complainant ever accepted the gift, or knew that it was intended as a gift. The complainant ⁵⁶⁶ testified that at the time her father conveyed the farm to the sons, and at various times afterward, she talked with him about this matter, and her father told her that John was to pay him so much a year, and at his death she was to have five hundred dollars, and that she knew the mortgage was made to secure that amount to her. It is evident, therefore, that the complainant knew about the gift and that it was secured by the mortgage. There is no testimony that she did not accept it, and, under such circumstances, the rule is that, in the absence of proof to the contrary, a gift beneficial to the donee will be presumed to have been accepted: *In re Dunlap's Estate*, 94 Mich. 17, and cases there cited; *Green v. Langdon*, 28 Mich. 221.

In *Wadd v. Hazelton*, 137 N. Y. 215, 33 Am. St. Rep. 707, it appeared that the deceased asked one C. to draw an assignment of bond and mortgage to plaintiff, declaring his intention to give them to plaintiff. Deceased, after receiving the assignment, bond, and mortgage from C., kept them a month, and then delivered them, with other papers, to C.—the assignment being signed, but not acknowledged or recorded—directing C. to deposit them in the bank, where they remained at the time of his death. It was held that there was no declaration of trust; whereas, in the present case, the deceased himself placed the mortgage upon record, and stated to the complainant that she was to receive the sum of five hundred dollars. Here was a declaration of trust as well as a recording of the trust mortgage. The recording was equivalent to a delivery of the mortgage, and, by so recording it, the trustee had put it beyond his power to recall it. This was the only delivery possible under the circumstances. It has been repeatedly held in this state that the recording of a deed, with intent to pass title, is a sufficient delivery, and that actual manual delivery and formal acceptance are not necessary in such a case: *Compton v. White*, 86 Mich. 33; *Fenton v. Miller*, 94 Mich. 204; *Glaze v. Three Rivers Farmers' etc. Ins. Co.*, 87 Mich. 349. Recording a deed is presumptively a delivery, as between ⁵⁶⁷ grantor and grantee: *Sessions v. Sherwood*, 78 Mich. 234.

While it is held in *Glaze v. Three Rivers Farmers' etc. Ins. Co.*, 87 Mich. 349, that this presumption may be rebutted by proof

that the grantor did not thereby intend to pass title as of the date of the deed, yet, in the present case, the only matter that can be urged against this presumption is that the father afterward discharged, or attempted to discharge, the mortgage of record. This was long after the mortgage was recorded, and after he had power to recall the gift, and we think the testimony of complainant shows that the attempted discharge was made after her father had told her that she was secured under it. The circumstances are such that we are inclined to the view that it was a completed gift, and when made, and the mortgage was recorded, it was beyond the power of the donor to recall it.

The court below very properly held that the mortgage for the five hundred dollars remained a lien upon the property, and awarded foreclosure. That decree must be affirmed, with costs.

The other justices concurred.

GIFT INTER VIVOS—WHAT CONSTITUTES.—If a father conveys land to his son and takes the latter's note secured by a mortgage as payment, payable four years after the father's death to his heirs, interest during his life payable to himself, he thereby creates a gift inter vivos, completed as to delivery by making the heirs payees and by recording the mortgage: *Love v. Francis*, 68 Mich. 181, 6 Am. St. Rep. 290.

GIFTS INTER VIVOS—ESSENTIALS OF.—Delivery of the property with intent to give is absolutely necessary to the validity of a gift: *Wagoner's Estate*, 174 Pa. St. 558, 52 Am. St. Rep. 828; there must be a parting with dominion over the subject matter, with a present design that the title shall pass to the donee, and this so completely that, if the donor resumes control over it, he becomes a trespasser: *Liebe v. Battman*, 33 Or. 241, 72 Am. St. Rep. 705.

GIFTS—ACCEPTANCE.—The assent of the donee is presumed in the case of a donation: *Olds v. Powell*, 7 Ala. 652, 42 Am. Dec. 605. See, also, *Beaver v. Beaver*, 117 N. Y. 421, 15 Am. St. Rep. 581; note to *Brown v. Westerfield*, 53 Am. St. Rep. 553.

DEEDS—RECORDING AS DELIVERY.—If a deed is executed and recorded, no formal delivery is necessary as delivery is presumed: *McReynolds v. Grubb*, 150 Mo. 852, 73 Am. St. Rep. 448. See, further, the monographic note to *Brown v. Westerfield*, 53 Am. St. Rep. 547-550.

PEOPLE v. HOLLY.

[119 MICHIGAN, 687.]

MUNICIPAL CORPORATIONS—POWER TO OFFER REWARDS.—A municipal corporation, authorized to provide for the preservation of public property, and to adopt ordinances and make regulations for the safety and general welfare of its inhabitants, has power to offer a reward for the apprehension and conviction of incendiaries who have destroyed property within its limits.

Davis & Bromley and S. J. Patterson, for the appellant.

C. F. Collier and Spaulding, Norton & Dooling, for the appellee.

687 **HOOVER, J.** The village of Holly offered a reward for testimony that should secure the conviction of the persons who had set fire to certain buildings within its limits, and work was done upon the case by Sargeant and Green, and a deputy sheriff named Botsford. The reward seems to have been earned, and the council passed a resolution that unless, within ten days the parties claiming the reward should agree to arbitrate the question of who was entitled to it, the village attorney should cause a bill of interpleader to be filed against them. Nothing was done, however, under this resolution, and some time afterward 688 the attorney general filed the bill in this cause to restrain the payment of the reward to the persons named, or any of them. Such persons were not made parties to the suit. A decree was made restraining payment until a judgment should be obtained against the village. The complainant has appealed, and claims that the decree should have allowed a perpetual and unqualified injunction against the payment of the money. As the village has not appealed, we must assume that it is satisfied with the decree, and the only question before us is whether the complainant was entitled to a broader decree. Holly was incorporated under the general law for the incorporation of villages, which authorizes it to provide for the preservation of public property, and to adopt ordinances and make other regulations for the safety and general welfare of the inhabitants, not inconsistent with the general laws of the state.

The authorities are not harmonious upon the subject of rewards. The Massachusetts courts seem to recognize the existence of an implied power to offer rewards for the apprehension of incendiaries who have destroyed property within the city, from what is called the "general welfare clause": *Freeman v.*

Boston, 5 Met. 56; Loring v. Boston, 7 Met. 411; Mead v. Boston, 3 Cush. 404; Crawshaw v. Roxbury, 7 Gray, 374; Brown v. Bradlee, 156 Mass. 28, 32 Am. St. Rep. 430. In New Hampshire the authority is expressly conferred: See Janvrin v. Exeter, 48 N. H. 83, 2 Am. Rep. 185. In Pennsylvania, municipalities have the authority to offer rewards in such emergencies: Shaub v. Lancaster, 156 Pa. St. 366; York v. Forscht, 23 Pa. St. 391. 2 Bacon's Abridgment, 147, supports the doctrine that the power to prevent fires is incidental to all municipalities, while Mr. Dillon says: "The governing body of a municipal corporation (which has express power to protect the property and promote the welfare of its inhabitants) may, it has been held, offer a reward for the detection of offenders against the general safety of its people, as, for instance, those guilty of the crime of arson within its corporate limits. The contrary doctrine has also been held": 1 Dillon on Municipal Corporations, 4th ed., sec. 139.

The California supreme court is said to uphold the power, but we are unable to verify it from the citation given. Some of the states deny it. The latest case seems that of Winchester v. Redmond, 93 Va. 711, 57 Am. St. Rep. 822, where authorities supporting it are collected. Of these some apply to other offenses, the commission of which affects the inhabitants of the city only in common with those of the state outside of the city. Thus, in Baker v. Washington, 7 D. C. 134, it was held that the defendant had no authority to offer a reward for the capture of the slayer of President Lincoln. A similar case, involving a reward for murder, is that of Gale v. South Berwick, 51 Me. 174. Patton v. Stephens, 14 Bush, 324, applied the same rule to a reward offered for the apprehension of one who, through forgery, had embezzled the city funds. The case of Hanger v. Des Moines, 52 Iowa, 193, 35 Am. Rep. 266, was another case of reward for the detection of a murderer. Butler v. Milwaukee, 15 Wis. 498, was not a case of arson, and seems to be within the principle of the preceding cases. The rewards in all of these cases are open to the criticism that they were not offered to preserve the welfare of the inhabitants of the municipality, as contradistinguished from those of the general public. The case of Murphy v. Jacksonville, 18 Fla. 318, 43 Am. Rep. 323, is not in point, because governed by a prohibitive statute, which, in the absence of a "general welfare clause" (which does not appear), is a sufficient reason for the decision. Crofut v. Dan-

bury, 65 Conn. 298, is in point, and supports *Winchester v. Redmond*, 93 Va. 711, 57 Am. St. Rep. 822.

The danger of conflagrations in cities and villages necessitates preventive measures that are not common in ^{and} sparsely settled districts, and such municipalities are authorized to expend large sums for apparatus to extinguish them. But these only serve to prevent the spread of fires. A determined incendiary in a city is a menace which cannot be safely disregarded, and may call for more than the ordinary methods to guard against his acts. We think the "general welfare clause" is sufficiently broad to cover the employment of private detectives, through rewards, in such emergencies. We consider its exercise as "contravening no provision of the constitution, . . . and made in the exercise of the police power necessary to the safety of the city," and, we may add, impliedly conferred upon it: See *Baumgartner v. Hasty*, 100 Ind. 580, 50 Am. Rep. 830.

The decree is affirmed, with costs.

The other justices concurred.

REWARDS.—MUNICIPAL CORPORATIONS have no power to offer rewards for the apprehension of persons guilty of incendiarism or other crimes, unless such power is specially conferred by statute. It is not given by a provision in the charter or general law authorizing the municipality to do all such things as it may deem proper for the prosperity, quiet, and good order of the city: *Winchester v. Redmond*, 93 Va. 711, 57 Am. St. Rep. 822.

CASES
IN THE
SUPREME COURT
OF
MISSOURI

STATE v. KUHLMAN.

[152 MISSOURI, 190.]

CRIMINAL LAW—ACCOMPLICE—WHO IS NOT.—A person convicted of larceny is not an accomplice with another charged with buying and receiving the stolen property, knowing it to have been stolen.

TRIAL—INSTRUCTIONS.—It is not error to refuse to give an instruction the substance of which is covered by another instruction already given.

G. N. Fickeissen, for the appellant.

E. C. Crow, attorney general for the state.

¹⁰¹ **GANTT, P. J.** The defendant was indicted at the October term, 1897, of the circuit court of St. Louis, for knowingly receiving and buying a horse from one William Van Leuven, which had previously been stolen from Randolph See, Jr., in Montgomery county.

He was duly arraigned, pleaded not guilty, and on May 24, 1898, was convicted and sentenced to the penitentiary for two years. His motions for a new trial and in arrest of the judgment having been overruled, he has appealed to this court.

There was abundant evidence to sustain the charge. Practically the only question raised in this court is the propriety of the circuit court's action in refusing this instruction ¹⁰² asked by defendant: "The jury are instructed that, in considering the testimony of the witness Van Leuven, they should take into consideration the fact that he is the self-confessed thief of the prop-

erty mentioned, and you should consider this in passing upon the credibility of said witness."

The court of its own motion had already instructed the jury as follows:

"4. The jury are instructed that they are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony. In determining such credibility and weight they will take into consideration the character of the witness, his manner on the stand, his interest, if any, in the result of the trial, his relation to or feeling toward the defendant or the prosecuting witness, the probability or improbability of his statements, as well as the facts and circumstances given in evidence. In this connection you are further instructed that if you believe from the evidence that any witness has knowingly sworn falsely to any material fact, you are at liberty to reject all or any portion of such witness' testimony.

"5. The law presumes the defendant to be innocent, and this presumption continues until it has been overcome by evidence which establishes his guilt to your satisfaction and beyond a reasonable doubt; and the burden of proving his guilt rests with the state. If, however, this presumption has been overcome by the evidence and the guilt of the defendant established to a moral certainty and beyond a reasonable doubt, your duty is to convict. If you have a reasonable doubt of the defendant's guilt you should acquit, but a doubt, to authorize an acquittal on that ground, ought to be a substantial doubt touching the defendant's guilt, and not a mere possibility of his innocence."

While it is the settled law of this court that the jury are at liberty to convict on the uncorroborated testimony of an accomplice, it is equally well settled that the trial court should ¹⁰⁸ instruct the jury that such evidence ought to be received with great caution by the jury, and they ought to be fully satisfied of its truth before they convict upon such evidence alone: *State v. Donnelly*, 130 Mo. 642; *State v. Sprague*, 149 Mo. 409.

Defendant invokes these decisions and many others to the same effect to convict the circuit court of error in refusing the instruction asked by him and refused by the court. His contention is, that Van Leuven occupied the position of an accomplice toward the defendant, and that the same rule as to instructions on his evidence should be applied as in the case of an accomplice.

"An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the

commission of a crime": Wharton's Criminal Evidence, 8th ed., sec. 440.

In *State v. Umble*, 115 Mo. 452, we ruled that an accessory after the fact, although indicted as such, was not an accomplice within the meaning of the law. One bearing the relation of an accomplice, as defined by Dr. Wharton and approved by this court, is a principal in the first degree, and is liable to be charged and punished in the same manner as the principal: Rev. Stats. 1889, sec. 3944.

The defendant, however, could not have been convicted of the crime of larceny, of which Van Leuven was guilty and of which he was convicted. The evidence would not have justified an indictment against him as a principal offender in the indictment against Van Leuven. He was not guilty of larceny. He stands charged with another and distinct offense, to wit, that of buying and receiving stolen property, knowing it had been stolen. Following *State v. Umble*, 115 Mo. 452, we hold that Van Leuven was not an accomplice with defendant in the contemplation of law and that the court did not err in refusing the instruction asked.

¹⁰⁴ While we are satisfied with our own judgment in the *Umble* case, we find that the identical question raised in this record has been decided in the same way by the supreme courts of Georgia, Tennessee, Utah, and Iowa.

In *Springer v. State*, 102 Ga. 452, the court said: "In this state, receiving stolen goods, knowing the same to have been stolen, is indictable and punishable as an offense separate and distinct from the larceny itself, although the offender's connection with the latter crime is recognized to be that of 'an accessory after the fact,' and it is provided that he 'shall receive the same punishment as would be inflicted on the person convicted of having stolen or feloniously taken the property': Pen. Code, secs. 171, 172. . . . 'The authorities are not in accord as to whether an accessory after the fact is or is not an accomplice within the rule that the testimony of an accomplice should be corroborated': 1 Am. & Eng. Ency. of Law, 2d ed., 393. In *Lowery v. State*, 72 Ga. 649, and in *Allen v. State*, 74 Ga. 769, this court answered the question in the negative, expressing the view that even though a witness be accessory after the fact, he is not an accomplice within the meaning of our statute (Pen. Code, sec. 991) providing that no conviction can be had in any case of felony upon the uncorroborated testimony of an accomplice: See, also, *State v. Umble*, 115 Mo. 452; *People v. Chad-*

wick, 7 Utah, 134; State v. Hayden, 45 Iowa, 11; Harris v. State, 7 Lea, 124. The latter case is peculiarly in point; for it was therein held that the receiver of stolen goods is guilty of a substantive offense and is not an accomplice of the thief within the meaning of the Tennessee statute requiring a corroboration of accomplices."

The decisions cited by the learned court fully sustain its position.

The judgment is affirmed.

Burgess, J., concurs.

Sherwood, J., absent.

RECEIVING STOLEN GOODS—ACCOMPLICE.—In Illinois, the offense of receiving stolen goods is a substantive crime, punishable without reference to the trial or conviction of the person committing the larceny: Huggins v. People, 135 Ill. 243, 25 Am. St. Rep. 357. But in the note to Commonwealth v. Holmes, 34 Am. Rep. 410, on the competency of accomplices as witnesses, it seems that one who steals goods is regarded as the accomplice of one who receives them.

INSTRUCTIONS—REFUSAL TO REPEAT.—A defendant cannot complain of the refusal of an instruction if its substance is embodied in instructions which are given: Carlton v. People, 150 Ill. 181, 41 Am. St. Rep. 346; State v. McClellan, 23 Mont. 582, post, p. 558.

STATE v. WILLIAMS.

[182 MISSOURI, 115.]

CRIMINAL LAW—FORMER JEOPARDY—DEMURRER TO PLEA OF.—If a person charged with forging a note offers as a plea in bar his previous trial and acquittal of uttering and having in his possession such note, and the prosecution enters a demurrer to such plea, the sufficiency of the plea is a question of law for the court to decide.

CRIMINAL LAW—FORMER JEOPARDY—DEMURRER TO PLEA OF.—If a plea of former conviction or acquittal on its face shows that the defendant is not indicted for the offense described in the special plea, a demurrer to such plea is proper practice.

CRIMINAL LAW—FORMER JEOPARDY.—If one offense is a necessary element in and constitutes an essential part of another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to a prosecution of the other.

CRIMINAL LAW—FORMER JEOPARDY—DISTINCT OFFENSES—FORGERY.—If a person is charged with having uttered and having in his possession a forged note, his acquittal on such charge is not a bar to his subsequent trial under a charge of having forged such note. The two indictments charge separate and distinct crimes of which neither is merely a degree of the other.

FORGERY.—AFTER VERDICT IT IS TOO LATE to question the incorporation of a bank named as payee in a forged note.

FORGERY—POSSESSION—PRESUMPTION.—A person who is recently in possession of, and attempts to sell or obtain money on, a forged note is presumed to have forged it, and unless such possession or forgery is satisfactorily explained, the presumption becomes conclusive.

Smoot, Mudd & Wagner, for the appellant.

E. C. Crow, attorney general, and S. B. Jeffries, assistant attorney general, for the state.

118 GANTT, P. J. At the August term, 1897, of the Scotland county circuit court, the defendant was indicted for forging a certain note for fifty dollars of the tenor following:

“\$50.00.

Memphis, Mo., July 28th, 1897.

“One hundred and twenty days after date for value received we promise to pay to the order of the Scotland County National Bank of Memphis, fifty dollars at its banking house in Memphis, Mo., with interest at the rate of eight per cent per annum from maturity, payable annually, and if not so paid to become as principal and bear the same rate of interest.

“**ROBERT WILLIAMS.**

“**EDWARD BUTLER.”**

Prior to the finding of this indictment defendant had been indicted in the same county at the preceding February term of said court for having feloniously had in his possession a certain false, forged, and counterfeited promissory note of the same tenor of the one he is charged in this indictment with having forged, which said promissory note he sold and delivered to one Robert M. Barnes, with intent to have the same ¹¹⁹ uttered, passed, and exchanged. He was acquitted of that offense.

When the indictment in this last case was filed defendant filed a special plea in bar, in which he alleged that he was charged in said indictment with uttering the forged instrument therein described, knowing the same to be forged and pleaded not guilty thereto, and that thereupon afterward the court ordered a trial of defendant on said indictment, a jury of twelve good and lawful men were duly impaneled, sworn, and charged with the deliverance of defendant, who after hearing the evidence returned a verdict acquitting defendant of said charge. He concluded his plea as follows: “And the said Harry Williams in fact saith that he, the said Harry Williams, and the said Harry Williams so indicted and acquitted as last aforesaid are one and the same person and not other and different persons, and that

the felonious uttering, knowing the same to have been a forged note, as described in said indictment, are one and the same forged instrument, charged in the present indictment, and not other and different notes; that in the present indictment to which he files this as a plea in bar or in abatement he is charged with forging the identical same instrument that he was charged with uttering, knowing the same to be forged, in the indictment on which he was tried and acquitted and no other or different instrument. Wherefore he claims that he has been put in jeopardy for the said offense with which he is now charged in said prior indictment and of this he, the same Harry Williams, is ready to verify. Wherefore he prays judgment and that by the court here he may be dismissed from said premises in the present indictment specified." The plea was subscribed and sworn to by defendant.

Thereupon the state filed a demurrer to said plea, which is in words and figures as follows: "Now comes the plaintiff, by her prosecuting attorney, and demurs to the plea in abatement filed in above cause by defendant, and for reason assigns: 1. The plea in abatement filed does not set up any defense to the charge against defendant, alleged in the indictment now against him; 2. Said plea in abatement sets forth the fact that the defendant had heretofore been prosecuted and acquitted on a different and distinct charge and for a different and distinct offense from that charged in the indictment against him, and to which he now pleads in abatement." The court sustained the demurrer to said plea, and denied defendant the right to have the same tried by a jury.

This action of the court presents the first question involved in this record. Did the plea present anything more than a question of law? Did the court err in refusing to submit it to a jury?

It is obvious that it simply pleads the record of defendant's acquittal of a criminal charge, and the demurrer of the state admits the existence of that record, but says, conceding all that it shows, it is not a bar to the indictment in this case. Granting, as we may freely do, that when a plea of former conviction or acquittal tenders an issue of both law and fact that it should be tried by a jury, as in *State v. Huffman*, 136 Mo. 58, it does not follow that when, as in this case, the identity of the prisoner and the record of the former indictment, trial, and acquittal are admitted by the state, that there is anything for a jury to pass upon. The legal efficacy of the record offered to sus-

tain the discharge from the crime charged in this second indictment was solely a question of law which the court was bound to decide.

Bishop, in his *New Criminal Procedure*, volume 1, section 816, subsections 4 and 5, says: "The question of identity, both of the parties and of the offense, being settled, the court determines as of law whether or not there has been a previous conviction or acquittal." This must be so, for whether the second indictment charges the same offense as that set forth in the plea can be decided only by an inspection of the record, and ¹²¹ it is the duty of the court to declare the legal effect of a record which is offered to sustain a plea of autrefois acquit: *State v. Rugan*, 68 Mo. 214; *Martha v. State*, 26 Ala. 72; *Commonwealth v. Trimmer*, 84 Pa. St. 70; *Gormley v. State*, 37 Ohio St. 120.

In a word, it is the accepted doctrine, resting alike upon precedents and reason, that where a plea of former conviction or acquittal on its face shows the defendant is not indicted for the offense described in the special plea, a demurrer is the proper step. No error was committed in not submitting the sufficiency of the plea to a jury.

2. The vital question is, Did the court decide the demurrer correctly? At the base of this inquiry lies the guaranty of our constitution, that "no person shall, after being once acquitted by a jury, be again, for the same offense, put in jeopardy of life or liberty": Const. 1875, art. 2, sec. 23.

Section 3951 of the Revised Statutes of 1889 provides: "When a defendant shall be acquitted or convicted upon any indictment he shall not thereafter be tried or convicted of a different degree of the same offense, nor for an attempt to commit the offense charged in the indictment, or any degree thereof, or any offense necessarily included therein, provided he could have been legally convicted of such degree or offense, or attempt to commit the same, under the first indictment."

In *State v. Huffman*, 136 Mo. 62, this court quoted with approval the following language of the supreme court of Vermont in *State v. Smith*, 43 Vt. 324: "When one offense is a necessary element in, and constitutes an essential part of another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to the prosecution for the other."

These constitutional and statutory provisions are so explicit in and of themselves that little room is left for judicial ¹²² construction. The learned counsel for defendant relying upon these provisions assert that the forgery was an essential ingre-

dient of the crime charged in the first indictment, and it is the gravamen of the present indictment. They contend defendant was put in jeopardy the second time, having been acquitted under the first indictment.

Is this true? Is the offense charged in the first indictment the same as that charged in the present indictment, or is it a different degree of the offense charged in this one, or was it necessarily included in the former indictment?

The first indictment was drawn under and charged the crime denounced in section 3634 of the Revised Statutes of 1889, or, in other words, it charged defendant with knowingly uttering a forged instrument.

This indictment charges an offense under section 3633, to wit, the forging of said instrument by the defendant himself. It stood admitted by the demurrer that the defendant in this case was the same person who was tried for uttering the forged note. It stood admitted, moreover, that this was the instrument he was charged to have uttered, knowing it was a forgery. This was clearly not an admission, however, that these two offenses were one and the same, or that one was a degree of the other, or that it was essential to the proof of the crime of uttering a forged instrument to have proved that defendant himself was the forger.

Under our statutes they are distinct and separate crimes. The supreme court of Arkansas in *Ball v. State*, 48 Ark. 102, said: "Forgery is one offense, and uttering a forged instrument as genuine, knowing it to be false and forged, is another and distinct offense. A party might be convicted of either without being guilty of the other."

The doctrine maintained in many of the states, that counts for each of said offenses may be joined in one indictment and the state not compelled to elect, does not affect the question: *People v. McMillan*, 52 Mich. 627; *State v.* ¹²³ *Wood*, 13 Minn. 121; *Buren v. State*, 16 Lea, 61; *State v. McCormack*, 56 Iowa, 585; *State v. Snow*, 30 La. Ann. 401; 1 *Bishop's New Criminal Law*, sec. 1066. Applying another test: The facts alleged in this the second indictment, if proven to be true, would not have warranted a conviction on the first or the indictment for uttering a forged note: *Commonwealth v. Trimmer*, 84 Pa. St. 69. On the other hand, on the trial of the first indictment, it was not essential to prove that defendant forged the note. Proof of forgery by some other person, and his uttering the same knowing it was a forgery, was all that was necessary. Being dis-

ting offenses, neither is merely a degree of the other. Upon the whole we think the circuit court did not err in sustaining this plea.

3. The objection as to the failure to prove the incorporation of the Scotland County National Bank cannot be sustained. It was not necessary to prove the existence of the bank by a certified copy of its charter. It was shown without objection that there was such a bank, and that several of the witnesses were its officers, and that the note was sold to its cashier. After verdict it is too late to question the character of the evidence introduced to show the existence of the bank. The allegation was moreover not to defraud said bank, but simply to defraud.

4. Error is assigned on the instruction given by the court to the effect that one who is recently in possession of and attempts to sell or obtain money on a forged note is presumed to have forged the same, and, unless such possession or forgery is satisfactorily explained, the presumption becomes conclusive.

In *State v. Allen*, 116 Mo. 556, it was ruled that the presumption arising from the possession of the fruits of crime has with reason and propriety been indulged in prosecutions for forgery. The same considerations have actuated the courts as obtained in larceny and burglary, in which the ¹²⁴ recent possession of stolen property is prima facie evidence that the possessor is the thief, and, unless explained, becomes a conclusive presumption of his guilt: *State v. Kelly*, 73 Mo. 608; *State v. Burd*, 115 Mo. 405; *State v. Haws*, 98 Mo. 188; *State v. Yerger*, 86 Mo. 33. Tested by these repeated rulings, there was no error in the instruction.

5. We have examined the other points raised by counsel, but they do not constitute reversible error.

Finding no error, the judgment must be and is affirmed.

Sherwood and Burgess, JJ., concur.

FORGERY—FORMER JEOPARDY.—The forgery of an instrument and the passing of a forged instrument are two separate and distinct offenses under the code of Texas; hence the rule that a party can be prosecuted but once for the same offense, or for offenses growing out of the same transaction, does not obtain in cases of forgery and the passing of forged instruments: *Hooper v. State*, 30 Tex. App. 412, 28 Am. St. Rep. 926. Compare the extended note to *Roberts v. State*, 58 Am. Dec. 539, 541.

FORMER JEOPARDY—DEMURRER.—For cases sustaining a demurrer to a plea of former acquittal, see *Hooper v. State*, 30 Tex. App. 412, 28 Am. St. Rep. 926; *Gunter v. State*, 111 Ala. 23, 56 Am. St. Rep. 17.

ARNOLD v. ST. LOUIS.

[152 MISSOURI, 173.]

MUNICIPAL CORPORATIONS—DANGEROUS PREMISES—POND IN STREET.—In an action to recover damages for the death of children drowned while skating upon an uninclosed pond located on a public street, upon which such children ventured voluntarily and without invitation, the city cannot be held liable upon the ground that the pond, when covered with ice, was attractive to children and negligently left unguarded. As such children were not using the street for the purpose of travel, the rule which requires cities to keep their streets in a reasonably safe condition for pedestrians does not apply, and as such children went upon the ice to skate and, while skating thereon, were drowned, the city was not negligent in not inclosing or guarding such pond, and cannot be held liable in damages for their death.

MUNICIPAL CORPORATIONS—DANGEROUS PREMISES. In an action against a municipal corporation to recover damages for the death of children drowned while skating on an uninclosed pond located partly on a street and partly on adjoining land, no recovery can be had unless it is alleged and proved that the accident happened on that portion of the pond located in the street.

MUNICIPAL CORPORATIONS—DANGEROUS PREMISES—NUISANCE.—A city cannot be held liable for an injury occurring upon the land of another owner, upon the ground that the place where it occurs is a nuisance and that the city has failed to abate it.

NEGLIGENCE — DANGEROUS PREMISES — TRESPASSERS.—In order to recover damages for the death of children drowned while skating upon an uninclosed pond on defendant's land, there must be allegation and proof that such children were on the premises by permission or invitation of the defendant. Otherwise, it must be presumed that they were trespassers and their representatives without remedy against the defendant.

Martin & Bass and T. J. Rowe, for the appellants.

B. Schnurmacher, C. C. Allen, and L. F. Ottofy, for the respondents.

¹⁷⁵ **BURGESS, J.** This is an action by plaintiffs, who were at the time of the injury complained of, husband and wife, and as such prosecute this suit to recover from defendants, the city of St. Louis and Isabella Dawson, the sum of ten thousand dollars damages for the death of their two minor children, Arthur James Arnold and Amanda Mary Arnold, who were drowned in the city of St. Louis, on the twelfth day of January, 1897,¹⁷⁷ while skating upon the ice which had formed upon a pond of water, which it is alleged had formed upon a portion of Taylor avenue, one of the public streets in said city, between Margaretta and Kossuth avenues, and upon land of the defendant, Isabella Dawson, abutting the west side of said Taylor avenue.

The petition is in two counts. The first is to recover five

thousand dollars on account of the death of the boy, and the second is to recover the same amount on account of the death of the girl. This is the only material difference between the two counts. They both aver that the children were minors and unmarried; that the city of St. Louis is and was a municipal corporation; that Taylor avenue, between Margaretta and Kossuth avenues, is a public highway, and that defendant Isabella Dawson, at the times mentioned in the petition, was the owner of certain real estate fronting on the west side of Taylor avenue, between the streets mentioned; and that on January 12, 1897, and for a long time prior thereto, the defendants carelessly, negligently, wrongfully, and unlawfully suffered and permitted a large body of water, two hundred feet long, one hundred feet wide, and twenty feet deep, to collect and remain on the above portion of Taylor avenue and on the real estate of defendant Dawson. That said body of water had collected and remained on said street and said premises for more than a year prior to January 12, 1897, which fact was well known to the defendant city, and that it was the duty of said defendant to so guard said body of water that it would not be dangerous to the public.

The petition further alleges that the water so collected was in the vicinity of the Ashland school, one of the public schools of the city of St. Louis, and that when frozen over it was attractive to children of tender years, and to the deceased children of plaintiffs, who were drawn there for the purpose of skating upon the ice. That upon the day just named ^{17th} ice had formed upon the pond, attracting children from said school, and other children, to skate thereon, "and that the ice on said pond was so thin that it was dangerous to go thereon." The petition proceeds to allege that on January 12, 1897, the children of plaintiffs, attracted as aforesaid, went upon the pond to skate; and the ice broke, and that they were immediately drowned.

It is also averred in each of said counts that the fact that a large number of children were in the habit of skating upon said ice was well known to defendants, and that the death of the children was caused "by the carelessness and the negligence and wrongful action of the defendants in wrongfully suffering and permitting said pond to form on said Taylor avenue and said real estate above and heretofore described herein and to remain thereon unguarded so that when it was frozen over it would attract children to skate thereon."

To this petition each of the defendants filed a general de-

murrer, on the ground that the same does not contain facts sufficient to constitute a cause of action, which demurrers were sustained by the court. Plaintiffs declining to plead further, final judgment was entered in favor of defendants on the demurrers, and plaintiffs brought the case to this court by appeal.

The petition shows very conclusively that the action is not based upon the ground that Arthur James Arnold and Amanda Mary Arnold were travelers upon the street of defendant city, and that by reason of its unsafe condition it was dangerous to persons passing along and upon it in consequence of which they were drowned, but upon the ground that the pond, when covered with ice, was attractive to children, so that, as deceased were not using the street at the time of the accident for the purpose of travel, the rule of law which requires municipalities to keep their streets in a reasonably safe condition for that purpose does not govern in this case, for the city owed them no such duty: *Smith v. St. Joseph*, 45 ¹⁷⁹ Mo. 449; *Bassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446; *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325; *Kiley v. Kansas City*, 87 Mo. 103, 56 Am. Rep. 443; *Brennan v. St. Louis*, 92 Mo. 482.

At Taylor avenue, where the accident occurred, it seems that the water covered the street to the depth of twenty feet, and that the children went upon the ice, which had accumulated over it on the pond, and were skating thereon, in consequence of which they were drowned; so that unless the city was negligent in permitting the pond to remain in its uninclosed or unguarded condition, it cannot be held to respond in damages in consequence of the death of the children.

In the case of *Schauf v. Paducah* (Ky., March 17, 1899), 50 S. W. Rep. 42, there was a pond in the commons of the city, some distance from any highway, and while plaintiff's son, about seven years of age, was crossing the commons, he caught a bird, and seeing some children fishing at the pond, he went over to where they were. The bird got away from him and fluttered out into the water, and he waded out after it, and in doing so ventured too far, and got over his depth and was drowned. It was ruled that the city was not liable. The court said: "Accumulations of water are common about all cities, especially river towns. A large part of the farmhouses of this state have ponds about them. The city was under the same obligation as any other lotowner, and no more. The child did not lose his life from the dangerous proximity of the pond to a highway, or from any secret danger, such as a great depth of water near the

bank, but from his voluntarily wading out in the pond some ten feet, after the bird. It was not the duty of the city to provide against such a contingency as this. In *Gillespie v. McGowan*, 100 Pa. St. 144, 45 Am. Rep. 365, a boy, eight years old, while fishing in a well in an old brickyard, fell in it and was drowned—a stronger case for the plaintiff than we have here—yet it was held there could be no recovery. The court said: ‘We are unable to see anything in this case to charge the defendants with negligence in not inclosing their lot or guarding ¹⁸⁰ the well. There was no concealed trap or deadfall, as in *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332. The well was open and visible to the eye. No one was likely to walk into it by day, and this accident did not occur at night. A boy playing upon its edge might fall in, just as he might in any pond or stream of water. In this respect the well was no more dangerous than the river front on both sides of the city, where boys of all ages congregate in large numbers for fishing and other amusements. Vacant brickyards and open lots exist on all sides of the city. There are streams and pools of water where children may be drowned; there are inequalities of surface where they may be injured. To compel the owners of such property to inclose it, or fill up their ponds, and level the surface, so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any such principle, even where the trespassers are children. We all know that boys of eight years of age indulge in athletic sports. They fish, shoot, swim, and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is part of a boy’s nature to trespass, especially where there is tempting fruit; yet I never heard that it was the duty of the owner of a fruit tree to cut it down because a boy trespasser may fall from its branches. Yet the principle contended for by the plaintiff would bring us to this absurdity if carried to its logical conclusion. Moreover, it would charge the duty of protection of children upon every member of the community except their parents.’

In *Dehanitz v. St. Paul*, 73 Minn. 385, there was within the city of St. Paul a slough which, during high water in the Mississippi river, filled with water and had no outlet. The streets in this part of the city were dedicated to the public, but never by the city opened, kept, or used, although the tract was an open common. In this slough was an open basin sixty to seventy-five feet across, ¹⁸¹ which was contiguous to James street. For a long time the city had used this hollow basin as a place

for dumping garbage and manure, which, during high water, floats upon the water, and forms a crust, upon which grows vegetation similar to that upon surrounding land. The plaintiff's intestate, a girl ten years old, left James street, upon which she had been traveling, and, either for convenience or pleasure, attempted to cross over this crust on her way to a packing-house, one-fourth of a mile distant, when the crust broke, and she fell into the water and was drowned. It was not alleged in the petition that the public had ever traveled over this dumping ground, or used it as an open common. It was held, on demurrer to the petition, that the city owed no duty of protection or warning in respect to the girl going upon this dumping ground or crust as a traveler, and hence was not liable in damages for her death.

The principle announced in these cases seems to be decisive of the case in hand, for although the petition avers that Taylor avenue, between Margaretta and Kossuth avenues, is a public highway, which implies that it was open to the use of the public, the subsequent allegation that it was covered with water twenty feet deep shows that it was impossible that it could have been used for such a purpose.

The act of the children in venturing upon the ice was entirely voluntary upon their part, and is wholly unlike that class of cases where a person, traveling with proper care upon a sidewalk in a city, and by reason of its defective condition, or its proximity to some hole or dangerous place, falls and is injured, for in such case the city will be held to respond in damages for the injury, upon the ground that as to such persons it is bound to keep its sidewalks in a reasonably safe condition for pedestrians both by day and by night, while as to persons not using its sidewalks for the purposes for which they are intended, for instance, skating upon ice formed thereon on a pond twenty feet deep, it owes no such duty.

¹⁸² Plaintiffs, however, rely upon *Lepnick v. Gaddis*, 72 Miss. 200, 48 Am. St. Rep. 547, as supporting their contention. In that case Gaddis owned a lot at the intersection of two streets. A storehouse which stood thereon was burned down some years before the accident, leaving an uncovered cistern on the vacant lot. It was alleged in the petition that, by the invitation and by the license of the defendant, the public, in passing from street to street, crossed over his lot by two commonly traveled paths, which became well defined, and each of which ran near by the cistern. It was also alleged "that, during the winter of

1893, plaintiff, a stranger, while carefully using the highway, the night being dark, rainy, and cloudy, and there being nothing to show where the highway ended and the vacant lot began, strayed therefrom, and, whilst so bewildered and lost, fell into said cistern and was injured. Held, upon demurrer to the petition, that it stated a good cause of action." It will be obvious that there is a very material difference between the facts in that case, and in the one in hand, in this—in that case the injured party did not knowingly and voluntarily enter a place of danger, while in the case in hand they did.

Indianapolis v. Emmelman, 108 Ind. 530, 58 Am. Rep. 65, is another case relied upon by plaintiff. In that case the defendant city, while constructing a bridge, made an excavation in the bed of a shallow stream where it was crossed by a street, and constructed a levee from the bank to the excavation, and, knowing that the children of persons residing near were accustomed to play in the vicinity, left it, in the absence of workmen, without safeguards of any kind, by reason of which a child five years of age, while at play, without any fault on the part of its parents, fell into the excavation and was drowned. It was held that the city was liable. But that case, it will be seen, was bottomed upon the negligent act of the city in digging a hole in the street in which water accumulated, and into which plaintiff's child fell and was drowned.

¹⁸⁹³ *Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114, is another case relied upon by plaintiffs. That was an action against the city as the owner of land next to one of its streets, upon which land there was a deep hole or pit in which water had accumulated, and upon which floated logs and planks, which was alleged to be a source of attraction to children in the locality, who resorted there to play. Plaintiff's child, eight years of age, while so engaged was drowned, and it was held that plaintiff might recover. But that case is not in line with the rulings of this court in *Overholt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557, *Witte v. Stifel*, 126 Mo. 295, 47 Am. St. Rep. 668, and *Butz v. Cavanaugh*, 137 Mo. 503, 59 Am. St. Rep. 504. In the case last cited, it was held that the owner of land was not responsible for injuries sustained by a boy twelve years of age who voluntarily went into an excavation on private property near a street and burned his feet in a smoldering fire therein.

The petition does not allege that the accident happened in that portion of the pond which is located in the street, which was absolutely necessary in order to hold the city upon the

ground that the pond was a nuisance. And if the accident happened upon that portion of the pond located upon the land of Isabella Dawson, the city cannot be held liable for an injury occurring upon the land of another, upon the ground that the place where it occurs is a nuisance, and that the city had failed to abate it: *Moran v. Pullman Palace Car Co.*, 134 Mo. 641, 56 Am. St. Rep. 543; *Harman v. St. Louis*, 137 Mo. 494.

As to the defendant Isabella Dawson, if the children were drowned upon that part of the pond which is upon her land, there is nothing in the petition which tends to show that they were there by her permission or invitation, in the absence of which it must be inferred that they were trespassers and their representatives without remedy against her: *Witte v. Stifel*, 126 Mo. 295, 47 Am. St. Rep. 668; *Moran v. Pullman Palace Car Co.*, 134 Mo. 641, 56 Am. St. Rep. 543; *Overholt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557; *Butz v. Cavanaugh*, 137 Mo. 503, 59 Am. St. Rep. 504.

For these considerations we affirm the judgment.

Gantt, P. J., concurs.

Sherwood, J., absent.

DANGEROUS PREMISES—DROWNING IN POND.—A city is not answerable for the death of a child from drowning in a pond situated on private property, not in dangerous proximity to a public highway, although the city may have created the pond by overflowing the property: *Omaha v. Bowman*, 52 Neb. 293, 66 Am. St. Rep. 506; neither is the owner of the premises liable: *Cooper v. Overton*, 102 Tenn. 211, 73 Am. St. Rep. 864. See, also, *Peters v. Bowman*, 115 Cal. 345, 56 Am. St. Rep. 103, and the extended note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 423-424.

HUFFMAN v. NIXON.

[152 MISSOURI, 303.]

FRAUDULENT CONVEYANCES.—A DEED OF TRUST made to hinder and delay creditors, although recorded before the levy of an attachment, is fraudulent and void as to such attachment creditors.

FRAUDULENT CONVEYANCES—DEED OF TRUST—ATTACHMENT—PRIORITY.—If a deed of trust made to hinder and delay creditors is recorded before the levy of an attachment, but not received by the cestui que trust until after the attachment is levied and an abstract thereof recorded upon the land described in the deed, the title of the purchaser at the execution sale under the attachment is prior to any right or interest conveyed by the trust deed.

EXECUTION SALES—INTEREST SOLD—ESTOPPEL.—If a sheriff attaches and sells, in compliance with statute, all the right, title, and interest of the defendant in land, the purchaser gets all interest of the defendant and not simply the equity of redemption, and the statement in the notice of sale, that such sale is made subject to all prior liens and judgments, does not affect the purchaser's right to contest the validity of a trust deed on the property made to hinder and delay creditors.

EXECUTION SALES—ESTOPPEL.—The belief of a purchaser of all of defendant's interest in land at an execution sale, at the time of the sale and for a long time afterward, that a deed of trust on the property was valid, and his conduct in relation thereto does not estop him from afterward contesting the validity of such deed with the maker or those claiming under him.

W. M. Williams and J. Cosgrove, for the appellant.

Silver & Brown and B. R. Richardson, for the respondents.

³⁰³ **ROBINSON, J.** This is a suit in equity begun in the Morgan circuit court in April, 1892, to set aside a fraudulent deed of trust on certain land in Morgan county, executed by J. B. Kelsey to Charles D. Nixon in trust to secure the payment of a promissory note of three thousand dollars payable to Charles T. Kelsey, and praying that plaintiff's title be adjudged paramount to that conveyed by the deed of trust.

The cause was tried at the June term, 1896, of the Saline ³⁰³ circuit court, where it had been taken on change of venue, and resulted in a dismissal of plaintiff's bill, to reverse which plaintiff has brought the case to this court by appeal.

The amended petition, upon which the case was tried, alleges, in substance, that plaintiff purchased the land embraced in the deed of trust in question at a sale under several executions issued upon judgments in favor of C. H. Knoop and another against J. B. Kelsey, made by the sheriff of Morgan county,

Missouri, during the October term, 1883, of the Morgan circuit court; that said judgments were rendered in attachment proceedings against the property of J. B. Kelsey begun August 23, 1882; that personal service was made in each of the attachment suits upon said J. B. Kelsey, and said real estate levied upon by the sheriff under the several writs of attachment; that plaintiff's purchase of the land in controversy vested in him all the right, title, and interest J. B. Kelsey had therein on August 23, 1882; that said J. B. Kelsey pretended to make a deed of trust thereon to secure a pretended indebtedness of three thousand dollars to his brother Charles T. Kelsey of Tompkins county, New York, dated July 22, 1882, but that it was not delivered to said Charles T. Kelsey until after the seizure of said land upon writs of attachment in the several suits; that the deed of trust was filed for record in the recorder's office of Morgan county by J. B. Kelsey before any of the attachment writs were levied; that after it was recorded it was redelivered to J. B. Kelsey and by him controlled until September 1, 1892, when he delivered it to his brother, Charles T. Kelsey, in New York; that the levies of the several writs of attachment became liens upon the said land prior to the delivery of the deed of trust to Nixon and Charles T. Kelsey; that the deed of trust was executed without any consideration whatever, that Charles T. Kelsey is the brother of J. B. Kelsey and Nixon is a cousin of both J. B. and Charles T. Kelsey, with whom he sustained confidential relations; that the note and deed of trust were fraudulent transactions as ³¹⁰ against the creditors of J. B. Kelsey, and part of a scheme to defraud the creditors of the latter, who, it is alleged, at the date thereof, was largely indebted and in failing circumstances, and that the making of said deed of trust was in furtherance of such scheme; that as the deed of trust was recorded prior in point of time to the levy of the several writs of attachment it cast a cloud upon the plaintiff's title, and was apparently a prior lien; that plaintiff's title was in right and equity of prior date to the deed of trust. The prayer of the petition is, that the deed of trust be canceled, set aside, and for naught held; and that the same be decreed to have been executed in fraud of the creditors of J. B. Kelsey; and that plaintiff's title be decreed prior and superior to any right or interest conveyed by the deed of trust; and for general relief.

The defendants answered jointly, denying generally the allegations of the petition, and set up and interposed the ten

years' statute of limitations as a defense to the ground of action that the deed of trust was not delivered until after the alleged attachment liens accrued, and pleaded the answer of plaintiff filed in the Morgan circuit court in the case of C. H. Knoop v. C. F. Nixon, J. B. Kelsey, Charles T. Kelsey, and himself, wherein he then averred and claimed that the land purchased by him was subject to the encumbrance of the deed of trust now in controversy and that he was then ready and willing to pay the same to whom the court should direct, and averred that the plaintiff purchased the land in controversy subject to the deed of trust the validity of which is assailed by plaintiff in this case; that plaintiff purchased only the equity of redemption of J. B. Kelsey in said land; that from the notice of sale and the oral proclamation made by the sheriff thereat, the latter sold only the equity of redemption, and that the plaintiff had consequently purchased only that interest, and for more than ten years had claimed no greater interest. The answer further averred that the election of Knoop to sell and of plaintiff to purchase the equity of redemption ³¹¹ only, and the failure of plaintiff to make any other claim prior to the filing of this amended petition herein, on August 7, 1894, effectually barred the plaintiff from the relief sought. The reply denied the new matter contained in defendant's answer.

Plaintiff contends that the note and deed of trust in question were fraudulent transactions against the creditors of J. B. Kelsey, and consequently, as purchaser of the mortgaged premises at sheriff's sale, is entitled to have the same set aside and removed as a cloud cast upon his title, and the defendant perpetually enjoined from proceeding thereon. In this connection counsel for plaintiff strenuously urges that in point of fact the deed of trust was not delivered until after the abstract of attachment had been filed by the sheriff with the recorder in at least one of the several attachment suits theretofore commenced against J. B. Kelsey, so that the levy of the writ of attachment and the sheriff's deed on execution sale thereunder were prior in point of time and constituted a prior lien. Defendants, on the other hand, maintain that the deed of trust was not only made in good faith, but actually delivered to the beneficiary before the attachment liens accrued; and, further, that even though the deed of trust was made in fraud of creditors, the plaintiff bought only the equity of redemption of J. B. Kelsey in the land in controversy, and therefore is in no position to assail the deed of trust on the ground of fraud.

The record discloses that in July, 1882, J. B. Kelsey was a banker at Versailles, in this state, deeply involved, with creditors pressing their claims for payment, and, indeed, might fairly be said to be insolvent and in failing circumstances. On July 22d a deed of trust was prepared and signed by J. B. Kelsey, and forwarded to his wife, then in the state of Maryland, for her signature, acknowledgment, and return; she acknowledged the deed of trust on August 14th, and returned the same to J. B. Kelsey, who filed the same for ³¹² record in the recorder's office of Morgan county on the twenty-first day of August at 11:30 A. M.

The deed of trust, it is conceded, purports to have been given to secure the payment of a note of three thousand dollars in favor of his brother Charles T. Kelsey, who resided in the state of New York, with interest thereon at the rate of seven per cent per annum. After the deed of trust in question had been recorded, J. B. Kelsey obtained the same from the recorder and sent it by mail, together with the note and abstract of title, to Nixon, at Oswego, New York, and the latter thereupon took it to the home of Charles T. Kelsey and says that he received the amount of the loan in checks and drafts. No part of the proceeds of this transaction, however, was ever turned over to J. B. Kelsey. Nixon held the checks and drafts received by him from Charles T. Kelsey until about the 5th of September, 1882, when, by direction of J. B. Kelsey, he turned them over to Thomas Kelsey, father of J. B. Kelsey, in payment of an alleged debt of upward of fifteen years' standing.

On August 23d, several attachment suits were commenced against J. B. Kelsey in the Morgan circuit court, his bank closed, and the land embraced in the deed of trust levied upon in each of the several attachment suits. Writs of attachment were levied in each of said suits on the twenty-third day of August, and abstracts of attachment were filed by the sheriff with the recorder. The evidence shows that the first abstract of attachment was not filed in the recorder's office until August 25th at 2 o'clock P. M., abstracts in the other cases having been filed later along at different times between the twenty-fifth and the twenty-eighth day of August.

It is conceded that judgment was duly rendered in each of said suits against J. B. Kelsey, and in favor of the respective plaintiffs, and that special executions were issued thereon, the land in question sold, and plaintiff became the purchaser at such sale. After his bank was closed and the several attach-

ments were run upon the premises embraced in the deed of ³¹³ trust, J. B. Kelsey telegraphed the trustee Nixon to pay the money derived from the note and deed of trust over to his (Kelsey's) father at once instead of sending it to him at Versailles, so as to prevent his Missouri creditors from attaching it. Nixon, however, did not turn the checks and drafts over to Thomas Kelsey, until about the 5th of September thereafter.

The record further shows that Charles T. Kelsey assigned the note secured by the deed of trust to his father, so that, as a matter of fact, he was not out any money whatever on the transaction. Shortly thereafter Thomas Kelsey died, leaving a will, in which Charles T. Kelsey was named as one of the executors. The entire personal estate of Thomas Kelsey was taken by Charles T. Kelsey at a valuation of six thousand six hundred dollars, the latter, however, only paying the sum of three thousand five hundred dollars therefor, thereby leaving the face of the J. B. Kelsey note, which had passed into his father's hands during his lifetime, unpaid, notwithstanding it constituted part of the alleged assets of said estate.

The evidence further shows that the deed of trust was not to become operative or taken as delivered until the abstract of title was delivered and the money furnished. As before stated, the deed of trust was filed for record on the twenty-first day of August, at 11:30 A. M., and we think that a careful reading of this record must impress the practical mind with the fact that it did not leave Versailles until the afternoon of the 22d, and possibly not earlier than the 23d of August. At this time it seems that the mail for the east closed at 1:30 P. M. The better evidence is to the effect that it would have taken the letter transmitting the note and deed of trust forty-eight hours, or thereabouts, to reach Nixon at Oswego, New York. The trustee Nixon, to whom the same was sent, lived about fifty miles from Charles T. Kelsey, and in delivering the note and deed of trust he was necessarily compelled to travel partly by rail and partly by team, so that the deed of trust could not very well have been delivered before the 26th of August, if ³¹⁴ that early. Charles T. Kelsey, whose deposition, taken in the former appeal, was read in evidence, failed to fix the date of the delivery of the deed of trust. The memory of the trustee Nixon on this question is likewise very unsatisfactory. When the latter's deposition was taken in the Knoop case in 1884 or 1885 he was unable to fix the date of delivery with any degree of certainty, but when he came to testify on the trial of this

case in 1896 his recollection with respect to this transaction seems to have greatly improved, so that, remarkable as it may seem, he was able to recall much more clearly and distinctly the circumstances of the delivery of the deed than in 1884.

But this growth of facts with the flight of years is not very satisfactory to the court. By a careful reading of all the testimony we have been forcibly impressed with the fact that the deed of trust made to Nixon to secure the alleged indebtedness of the brother Charles Kelsey, and that was afterward assigned by him to the father of himself and J. B. Kelsey, was but a part of a scheme to hinder and defraud the creditors of J. B. Kelsey in the effort to collect their debts out of the land in suit, and the trial court should for that reason have found the issue in favor of plaintiff. And we are also equally satisfied, without further detailing the testimony that has led us to the conclusion, that the deed of trust was not delivered by Nixon, the trustee (to whom it was sent), to Charles Kelsey, until after the levy of the attachment and the filing in the office of the recorder of the first abstract of same on the 25th of August, 1882, and for that reason the right of plaintiff as a purchaser at execution sale under said levy should have been declared prior to any right or interest conveyed or purporting to be conveyed by the deed of trust.

As to the two remaining contentions of defendant (and which judging from the briefs filed herein must have been the controlling question in the mind of the trial court, in the making of its judgment), first, that the sheriff sold and plaintiff bought only the equity of redemption of J. B. Kelsey in the ³¹⁵ land in controversy and, second, that he should now be estopped to assail the deed of trust covering the land, on account of his declaration and conduct, and the answer filed by him in the Knoop case recognizing its validity, notwithstanding the court may think and find the deed of trust in fact to have been fraudulent in its inception, we have this to say:

The proof shows that the sale was made in the usual way and that the sheriff sold all the right, title, and interest of the execution defendant in the land. The sheriff simply acted under and in conformity to the statute, and in virtue of the judgment of the court, and the law under which he acted conveyed all the interest and estate of the execution defendant in the land sold. If the land in fact was subject to a prior value deed of trust (regardless of the manner of the sale), the purchaser would only have bought the equity of redemption of

the original grantor, and execution defendant, while, on the other hand, if the sale had been made subject to the so-called deed of trust in express terms and the same should afterward be discovered fraudulent, and without regard to what the execution purchaser thought of it, at the time of the sale, or what he afterward said or offered to do, by the answer in the suit of Knoop against the Kelseys, Nixon, and himself in 1892, when Knoop attempted to have the sale set aside, it could and did not affect the interest purchased by him, and he cannot now be estopped by what was done or said from setting up the fraudulent origin and character of the deed of trust by those who have lost nothing by his belief, declaration, or answer filed.

Even though the execution creditors had no notice of the invalidity of the deed of trust placed upon the land by J. B. Kelsey, and the plaintiff, as execution purchaser, may, at the time of the sale and for a long time afterward have entertained the belief that the deed of trust was valid, that certainly ought not to preclude him now from testing its validity with the maker, or those claiming under the deed, when its fictitious and spurious character have been brought to light. If the deed of trust is void (and as such we have declared it), the plaintiff as purchaser at execution sale is now the owner of all the interest of J. B. Kelsey in the land therein described, and he has the right, by proper proceeding, to have the fraudulent deed of trust canceled and removed as a cloud cast upon his title, or his interest in the property declared prior and paramount thereto.

By section 543 of the Revised Statutes of 1889, the sheriff is required to declare in his return that "he has attached all the right, title, and interest of the defendant," etc. In conformity with the statute, the sheriff, as shown by the record, recited that he had attached all the right, title, and interest of J. B. Kelsey in the land in question, and, by an appropriate clause in the sheriff's deed, all the right, title, and interest of J. B. Kelsey in the real estate was transferred and conveyed to the plaintiff.

There is nothing whatever in this record showing that the sheriff's sale and deed thereunder did actually include only the equity of redemption.

Plaintiff's rights are not in any wise abridged or affected by the statement contained in the sheriff's notice of sale to the effect that the same was made "subject to all prior liens and judgments." All J. B. Kelsey's right, title, and interest in the premises was sold by the sheriff under executions issued

in the judgments rendered in the several attachment suits, and it is not conceived how that recital affects the case. Clearly, the sheriff could not limit the interest so sold by any statement of his. We are utterly unable to find anything in the circumstances of this sale tending to show that the plaintiff acquired simply an equity of redemption. The sheriff sold the interest of J. B. Kelsey in the land. The law says what that interest shall be and is.

Upon the filing of the abstract of the several attachments in the recorder's office the attachment liens took effect. As we have seen, judgments were duly rendered in the several attachment suits and sales were made at the same time ³¹⁷ on executions thereunder. The sheriff's deed, under which plaintiff claims, relates back to the time of the filing of the first abstract of attachment, which, as before stated, was filed by the sheriff in the recorder's office on the twenty-fifth day of August, at 2 o'clock P. M.

The deed of trust in question having been made in fraud of creditors, the defendants, as the active participators in the scheme to defraud the creditors of J. B. Kelsey of their rights, cannot be heard to complain.

From what has been said, it will be seen that the sheriff sold and conveyed to plaintiff all the right, title, and interest that J. B. Kelsey had in the land in question at the time the first abstract attachment was filed in the recorder's office, which, as already seen, was prior in point of time to the delivery of the fraudulent deed of trust. It therefore follows that the decree in this case should be reversed and the cause remanded to the circuit court with directions to cancel and annul the Nixon deed of trust, and decreeing the title acquired by plaintiff under the sheriff's deed in question paramount to any right acquired by defendants under the fraudulent deed of trust.

It is so ordered.

All concur.

FRAUDULENT CONVEYANCE.—AN ATTACHMENT may issue on the interest of a debtor in land held by a third party under a fraudulent conveyance: *McClelland v. Solomon*, 23 Fla. 437, 11 Am. St. Rep. 381, and note.

EXECUTION SALE—INTEREST PASSED BY.—A sheriff's deed to a purchaser at an execution sale passes all the title which the defendant held when the execution lien attached: *Note to Smith v. Crosby*, 40 Am. St. Rep. 828. An execution sale transfers the title held by the defendant at the moment of the sale, though acquired subsequent to the levy of the writ: *Note to Greer v. Wintersmith*, 7 Am. St. Rep. 619.

BAUSTIAN v. YOUNG.

[152 MISSOURI, 517.]

EVIDENCE—PHOTOGRAPHS.—A photograph taken several days after the occurrence has not precisely the same influence or weight as evidence as one taken in the moment of the act it purports to portray.

EVIDENCE—PHOTOGRAPHS ARE NOT ADMISSIBLE in evidence until it is proved by evidence aliunde to be a true photographic print of the thing in question at a particular time.

EVIDENCE—PHOTOGRAPHS, of themselves, are of the same character of evidence as diagrams and pictures drawn by hand, not necessarily carrying the same degree of probative force, but still of the same character, not in themselves evidence at all, but representing to the eye what the witness declares was the real appearance of the thing at the time he saw it.

EVIDENCE—PHOTOGRAPHS ARE NEVER ADMISSIBLE except as secondary evidence.

EVIDENCE—PHOTOGRAPHS.—The weight to be given to a photograph as evidence depends on the character of the thing shown in evidence and the skill of the person taking the photograph.

EVIDENCE—PHOTOGRAPHS—INSTRUCTIONS.—If a photograph is admissible in evidence for one purpose only, the court may so instruct the jury and limit consideration to that purpose.

NEW TRIAL—INSTRUCTIONS—JUDGMENT FOR RIGHT PERSON.—Although instructions given were erroneous, a motion for a new trial must be denied, if the verdict was unquestionably for the right party.

REAL PROPERTY—SIDEWALKS—DUTY OF ABUTTING OWNER.—An abutting property owner is not under any duty to keep the sidewalk in front of his premises in repair and safe for the public, nor is he liable for failure to do so to a person who is injured by a defect therein.

MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALKS.—In order to render a city liable to a pedestrian for failure to remedy a defect in a sidewalk, it must appear that the city had a reasonable opportunity of doing so, and, in order that that may appear, it must be shown, either that the city had notice of the defect, or that it was so obvious or had existed for such a length of time as to indicate that the city would have known it if it had exercised proper care in observing the conditions of its streets. Even after notice of the defect, the city is entitled to a reasonable time in which to make repairs, and is not liable until it has neglected such opportunity.

B. Schnurmacher and C. C. Allen, for the appellants.

J. L. Hopkins, for the respondents.

320 **VAILLIANT, J.** Appeal from the circuit court of St. Louis upon an order granting a new trial.

The suit is for damages for personal injuries which plaintiff avers he sustained in consequence of a defective sidewalk. There was but one witness who testified as to the accident and

its cause, which was the plaintiff himself. The only other ³²¹ witness for plaintiff was a physician who spoke of the nature of the injury. According to the plaintiff's testimony, he was walking on a plank sidewalk on Morganford road, which is an unimproved street in the outskirts of the city, when he stepped on the end of a plank which yielded to his weight and caused him to fall, striking his shoulder against a telegraph pole which caused the injury complained of. Morganford road at the point in question was like a country road, no curbing or guttering, and this wooden sidewalk was like what is seen in a country town. Whether it was put down by the city or the neighbors he did not know. After he got up he examined the place and saw that the ground underneath the sidewalk had washed out, the sleepers were rotten, and the nails hanging down; the hollow in the ground was what caused the plank to go down; it was rotten, but would not have given away but for the hollow in the ground under it. Plaintiff was a carpenter and was employed in that vicinity; during the period of this employment he had passed along Morganford road at this point about a dozen times, but had always before walked in the road, not on the sidewalk. Four days after the accident, plaintiff took a photographer to the scene, and caused two photographs to be taken showing the sidewalk at that point and the surroundings. These photographs were admitted in evidence over the defendants' objection. This, with the physician's testimony as to the nature of the injury, was all the evidence on the part of plaintiff.

Defendants produced five witnesses who testified that they habitually passed over that sidewalk several times daily and never noticed any defect in it.

This was all the evidence. At the close of the plaintiff's evidence, and again at the close of all the evidence, the defendant city asked an instruction in the nature of a demurrer to the evidence, which was each time refused and exception taken.

A number of instructions were given at the instance of ³²² the parties respectively about which no question is raised. But the court of its own motion gave the following: "The court instructs the jury that the photographs shown to the jury are only to be considered by the jury as evidence of the general surroundings of the place where the accident occurred; and are to be given only such weight, as such evidence, as the jury believe from all the facts and circumstances in evidence, they are fairly entitled to. In no event are the photographs, or

either of them, to be considered by the jury as any evidence at all of the accident or as to the cause thereof, or as to what parties are responsible for the condition of the sidewalk, or as to whether any person is responsible for the condition of the sidewalk or for the accident."

There was a verdict for defendants, which, on motion of plaintiff, was set aside and a new trial granted, on the sole ground that the court erred in giving the instruction above quoted. From that order defendants appeal.

1. The objection to the instruction insisted on by the respondent is that while in the first clause it indicates that the photographs are to be considered as evidence of the general surroundings of the place where the accident occurred, yet in the second clause the jury are directed not to consider them as evidence at all relating to the cause of the accident.

The photographs in connection with the testimony of the witness purport to show a defect in the sidewalk, which, according to the plaintiff's testimony, was the cause of the accident. If, then, the photographs are not to be considered as bearing on that point, they are not in evidence at all.

A photograph taken, as these were, several days after the occurrence has not precisely the same influence, or weight as evidence, as one taken in the moment of the act it purports to portray.

It is not admissible in evidence at all until it is proven by testimony aliunde to be a true photographic print of the ³²³ thing in question, but, after that foundation has been laid, the photograph speaks with a certain probative force in itself. We take judicial cognizance of the fact that the natural forces employed in the art of photography produce certain results, and we credit the picture accordingly. But a photograph speaks only of one instant, and that the instant in which the object is seen through the camera. It may be like the object as it appeared at another time, but the natural forces that printed the photograph do not so testify, and whether it is or not depends on other evidence.

These photographs testify to us how the sidewalk appeared at the time they were taken. The plaintiff testified that it appeared at the time of the accident as it appears in the photographs, but the photographs are silent on that point, and serve in that connection only as illustrations of the witness' testimony.

They are of the same character of evidence as diagrams and pictures drawn by hand; not necessarily carrying the same degree of probative force, but still of the same character; not in themselves evidence at all, but representing to the eye what the witness declares was the real appearance of the thing at the time he saw it. Diagrams, drawings, and photographs are resorted to only because the witness cannot with language as clearly convey to the minds of the court and jury the scene as the light printed it on the retina of his own eye at the time of which he is testifying. The supreme court of New Jersey have said: "As evidence, photographs have been held as admissible upon the question of identity and comparison of handwriting, and as secondary evidence when the primary and better evidence could not be obtained. It may be generally regarded as a rule that they are never admitted but as secondary evidence": *Goldsboro v. Central R. R. Co.*, 60 N. J. L. 51. The weight to be given this class of evidence, whether it be a diagram, painting, or photograph, depends on the character of the thing shown in evidence. As a diagram drawn ³²⁴ hastily or by an unskillful hand does not receive the same consideration as one drawn to a scale by a mathematician, so the art of photography does not render equally trustworthy results in the hands of the unskillful and the skillful artist.

The art of photography is also not exempt from the possibility of perversion and of being made the means of creating false appearances. The supreme court of Pennsylvania have said: "Photographs are competent evidence, and when properly taken are judicially recognized as of a high character of accuracy. . . . But in careless, or inexperienced, or interested hands they are capable of very serious misrepresentations of the original": *Beardslee v. Columbia Tp.*, 188 Pa. St. 502, 68 Am. St. Rep. 883. We hold, therefore, that the photographs in question, while not evidence independent of the witness, were nevertheless in evidence as illustrations of the witness' testimony, and the plaintiff was entitled to have them considered as such for what they were worth. This is in accordance with previous rulings of this court: *Mincke v. Skinner*, 44 Mo. 92; *Williamson v. Fischer*, 50 Mo. 198; *State v. O'Reilly*, 126 Mo. 597; *Geer v. Missouri etc. Lumber Co.*, 134 Mo. 85, 56 Am. St. Rep. 489.

Where evidence is admissible for one purpose only, it is proper for the court to so instruct the jury and limit their use of it to that purpose: *Garesche v. St. Vincent's College*, 76 Mo. 332.

But the instruction here complained of did not properly inform the jury of the legitimate use they might make of the photographs. It was susceptible in the first clause of the construction that they were evidence in themselves of the general surroundings at the place of the accident and in the second clause that they were not to be considered at all on certain points in the case among which was the cause of the accident; whereas they were in themselves, that is, independent of the testimony of the witness, not evidence at all, yet were in evidence as illustrations of his testimony and as such should have been considered on the question as to the cause of the accident. ³²⁵ The learned judge, therefore, correctly ruled on the motion for a new trial that the instruction should not have been given.

2. But although that instruction was erroneous, the motion for a new trial should have been overruled because the verdict was unquestionably for the right party.

There was no case made either in the petition or the evidence against the defendant Young. The theory of the petition as to him is that because he was the owner of the lot abutting the street at the point of the alleged defect, it was his duty to keep the sidewalk in repair. But he was under no such obligation. Whatever may be the obligation of the abutting property owner to the city when ordered by it to repair or build a sidewalk, and whatever may be his liability for defective construction when he undertakes to do it, he is under no duty to the public to keep the sidewalk in front of his premises in repair, and is not liable for failure to do so: *Norton v. St. Louis*, 97 Mo. 537; *St. Louis v. Connecticut Ins. Co.*, 107 Mo. 92, 28 Am. St. Rep. 402.

It is the duty of the city to keep its sidewalks and streets in reasonably safe condition for the public passing along them, but the city is not an insurer of the safety of persons using its streets and is liable only for failure to exercise ordinary care in that respect. If a sidewalk in the beginning is properly constructed and it should get out of repair, the city owes the duty to the public to cause it to be repaired within a reasonable time. But, in order to render the city liable for failure to remedy the defect, it must appear that the city had a reasonable opportunity of doing so, and, in order that that may appear, it must be shown either that the city had notice of the defect, or that it was so obvious or had existed for such a length of time as to indicate that the city would have known it if it had used proper care in observing the condition of its streets.

Even after notice of the defect the city is entitled to a reasonable time in which to make the repairs, and is not liable until it has neglected such opportunity: *Badgley v. St. Louis*, 149 Mo. 122; *Carvin v. St. Louis*, 151 Mo. 334.

²³⁶ The plaintiff's testimony, illustrated by his photographs, tends to show that the sidewalk was out of repair both in respect to the decayed condition of the wood, and a washing out of the ground underneath; that it was really the hollow in the ground that permitted the plank to go down. There is no testimony tending to show actual notice to the city of the condition of the sidewalk and no testimony tending to show how long it had remained in that condition, unless, as contended by respondent, the nature of the defect implies that it had existed for a considerable time. Common experience tells us that it takes time for a wooden structure exposed to the weather in this climate to decay; but that time is so indefinite and subject to so many influences, either advancing or retarding the process of decay, that no reasonable calculation of it can be made in a case like this. Besides, the testimony of plaintiff shows that the real cause of the yielding of the plank under the plaintiff's weight was the hollow beneath, caused by the ground being washed out; when that occurred is not shown. That the defect was not so obvious as to impute notice is shown by the plaintiff's testimony. The plaintiff himself had passed along the road frequently about the time, not over the sidewalk but in the road, and had never observed any such condition, and the five witnesses for defendant used the sidewalk daily several times and did not observe it. The evidence fails to show any knowledge on the part of the city or any circumstance from which notice could be implied, or that the city had neglected a reasonable opportunity to repair the defect. Under such evidence there could have been no verdict for the plaintiff.

The order granting a new trial is reversed, and the cause is remanded to the circuit court with directions to overrule the motion for a new trial and render judgment for the defendants in conformity with the verdict.

Brace, P. J., and Robinson, J., concur.

Marshall, J., not sitting, having been of counsel.

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS.—A city is not liable for injuries caused by a defect in a street, unless it had notice of the defect, or unless the defect had existed for such a length of time as to apprise its officers if they were diligent in performing their duties: Note to *Frankfort v. Coleman*, 65 Am. St.

Rep. 418. See, further, the extended note to *Goddard v. Harpswell*, 30 Am. St. Rep. 385-390.

DEFECTIVE SIDEWALKS—LIABILITY OF LOTOWNER.—The common law imposes no duty on the owner of premises fronting on a street to keep it in repair: See extended note to *Browning v. Springfield*, 63 Am. Dec. 355; and although a city may have imposed upon a lotowner the public duty of keeping sidewalks in front of his premises in repair, yet the city, and not the owner, remains liable in a private action for injuries resulting from his negligence or his omission to act: *Betz v. Limingl*, 46 La. Ann. 1113, 49 Am. St. Rep. 344. See, also, *Wilhelm v. Defiance*, 58 Ohio St. 56, 65 Am. St. Rep. 745.

Photographs as Evidence.

As Evidence, photographs are admissible on questions of identity of persons, premises, and things generally and comparison of handwriting, and in all cases as secondary evidence, where the primary or better evidence is not obtainable. In fact, it may be said generally that they are never admitted but as secondary evidence. The art of photography is of comparatively recent date, and the principles governing the admissibility of photographs in evidence have been laid down and examined in late years in numerous jurisdictions, and, although the utterances of the courts have not been altogether harmonious, the consensus of opinion is as above stated. For the introduction of photographs in evidence, a foundation must be laid, as in other cases where secondary evidence is offered, and it has been often said that the judgment of the trial court as to the sufficiency of such foundation is conclusive and not open to examination on appeal: *Goldsboro v. Central R. R. Co.*, 60 N. J. L. 49, 52; *Blair v. Pelham*, 118 Mass. 420. It is well established that photographs are not admissible in evidence when the original can be produced in court, photographs being at best but secondary evidence: *White Sewing Machine Co. v. Gordon*, 124 Ind. 495, 19 Am. St. Rep. 109. But a plain picture or representation produced by the art of photography, verified as a correct representation of the locality at the time of the accident, is admissible in evidence to enable the court or jury to understand and apply the established facts to the particular case. Such photographic scenes are admissible as appropriate aids to the jury or court in applying the evidence, whether it relates to persons, things, or places: *Dederichs v. Salt Lake City R. R. Co.*, 14 Utah, 137; *People v. Durrant*, 116 Cal. 182; *Wurmster v. Frederick*, 62 Mo. App. 634; *State v. Hersom*, 90 Me. 273; *Adams v. State*, 28 Fla. 511. The admissibility of a photograph in evidence does not depend upon its verification by the photographer, provided it is shown to be an accurate representation by anyone competent to speak from personal observation. The sufficiency of the verification is a preliminary question of fact for the decision of the trial judge: *McGar v. Bristol*, 71 Conn. 652. In *Louisville etc. R. R. Co. v. Hall*, 91 Ala. 112, 24 Am. St. Rep. 863, a photograph was admitted in evidence without any testimony as to its correctness, or of the point of view from which it was taken, and the court, not being able on appeal to agree upon its admissibility, held it to "be admissi-

sible for what it was worth." Courts judicially notice the art of photography, the mechanical and chemical processes employed, the scientific principles upon which they are based, and the results; *Lake v. Calhoun Co.*, 52 Ala. 115; *Barnes v. Ingalls*, 39 Ala. 193; *Ruloff v. People*, 45 N. Y. 213. In *Udderzook v. People*, 76 Pa. St. 840, the question of the admissibility of photographs in evidence was considered, and the court said: "It is evident that the competency of the evidence in such a case depends on the reliability of the photograph as a work of art, and this, in the case before us, in which no proof was made by experts of this reliability, must depend upon the judicial cognizance we may take of photographs as an established means of producing a correct likeness. Photography has become a customary and common mode of taking and preserving views as well as the likenesses of persons, and has obtained universal assent to the correctness of its delineations. We know that its principles are derived from science, that the images on the plate, made by the rays of light through the camera, are dependent on the same general laws which produce the images of outward forms upon the retina through the lenses of the eye. The process has become one in general use, so common that we cannot refuse to take judicial cognizance of it as a proper means of producing correct likenesses." And in another case, *Cowley v. People*, 83 N. Y. 464, 38 Am. Rep. 464, the court said: "We know not of a rule applicable to all cases ever having been declared that photographs are not competent. We do not fail to notice, and we may notice judicially, that all civilized communities rely upon photographic pictures for taking and presenting resemblances of persons and animals, of scenery and all natural objects, of buildings and other artificial objects. It is of frequent occurrence that fugitives from justice are arrested on the identification given by them. So the signs of the portrait and the photograph, if authenticated by other testimony, may give truthful representations. When shown by such testimony to be truthful representations of a person, we do not see why they may not be shown to the triers of the facts, not as conclusive, but as aids in determining the matter in issue, still being open, like other proofs of identity or similar matter, to rebuttal or doubt."

Premises.—Photographs of premises are competent evidence, and when properly taken are judicially recognized as of high order, but in careless or inexperienced or interested hands they are capable of very serious misrepresentation of the original. Before they are permitted to be used in the trial, therefore, there should always be preliminary proof of care and accuracy in taking them, and of their relevancy to the issue before the jury: *Beardslee v. Columbia Township*, 188 Pa. St. 496, 68 Am. St. Rep. 883. Photographic views of streets, buildings, railroad tracks, bridges, and many other objects shown to be true representations of the objects they are intended to depict, are properly used to identify the objects to which the evidence relates, "and, being an exact reproduction of the object they

represent, they are much more satisfactory evidence of the appearance of the thing represented than can be conveyed to the mind by any description given by the witness. We think whenever it is important that the locus in quo or any object be described to a jury, it is competent to introduce a photographic view," and the jury may properly be allowed to examine it with a magnifying glass and take it with them to the juryroom: *Barker v. Perry*, 67 Iowa, 146-148. "A photograph offered for the purpose of showing the appearance of premises or a physical object which cannot be produced in court nor inspected by the jury is secondary evidence. Its correctness or accuracy, like that of a map or diagram, must be proved before it can be received": *Cunningham v. Fair Haven R. R. Co.*, 72 Conn. 244, decided by the supreme court of errors of Connecticut, August 1, 1899; *Alberti v. Railroad Co.*, 118 N. Y. 77. The accuracy sufficient for the admission of the photograph as evidence is a preliminary question of fact to be determined by the trial court: *McGar v. Borough of Bristol*, 71 Conn. 652; *Van Houten v. Morse*, 162 Mass. 414, 44 Am. St. Rep. 373; *Cunningham v. Fair Haven etc. R. R. Co.*, 72 Conn. 244. "The proof of accuracy varies with the nature of the evidence the photograph is offered to supply. When it is offered as a general representation of physical objects as to which testimony is adduced for the mere convenience of witnesses in explaining their statements, very slight proof of accuracy may be sufficient, but when it is offered as representing handwriting which is to be subjected to minute and detailed examination, or any object where slight differences of height, breadth, or length are of vital importance, much more convincing proof should be required. It is common knowledge that as to such matters, either through want of skill on the part of the artist or inadequate instruments or materials, or through intentional and skillful manipulation, a photograph may not only be inaccurate, but dangerously misleading": *Cunningham v. Fair Haven R. R. Co.*, 72 Conn. 244. In actions to recover damages for personal injuries, photographs, shown by evidence to present a fair representation of the general features of the situation and premises where the injury is received, are admissible in evidence: *Warner v. Randolph*, 18 N. Y. App. Div. 458. A photograph proved to be a correct representation of physical objects to which testimony is adduced, is admissible in evidence for the use of witnesses in explaining their testimony, and thereby enabling the jury to understand the case more perfectly, but whether or not a photograph which has been offered for such auxiliary purpose has been proved to be a true representation is a question to be decided by the trial court, and his decision cannot be disturbed on appeal unless it is clearly shown that he erred: *Ortiz v. State*, 80 Fla. 256; *Cunningham v. Fair Haven R. R. Co.*, 72 Conn. 244; *Blair v. Pelham*, 118 Mass. 420. A witness may testify that a photograph introduced in evidence is a correct representation of a railway crossing at which an accident occurred: *Miller v. Louisville etc. Ry. Co.*, 128 Ind. 97,

25 Am. St. Rep. 416. And error in permitting a witness to refer to a photograph of a locality, without preliminary proof of its identity is cured by the production of such proof before the photograph is formally introduced in evidence: *Beardslee v. Columbia Township*, 188 Pa. St. 496, 68 Am. St. Rep. 888. It is not essential to the competency of a photograph as evidence that its accuracy as a true representation of its subject should be verified by the photographer who took it. Such verification may be furnished by any other eye-witness of equally correct vision and powers of observation, and equally interested to observe the features of the scene depicted: *Nies v. Broadhead*, 75 Hun, 255. The following cases will serve to illustrate the various circumstances under which photographs of the premises or the place of the accident have been admitted in evidence. Thus, in an action against a railroad company to recover for an injury caused by the destruction of a bridge, a photograph of the wreck, broken bridge, and stream, taken the morning after the accident and shown to be a correct representation of the scene, is admissible: *Locke v. South Carolina etc. Ry. Co.*, 46 Iowa, 109; *Turner v. Boston etc. R. R. Co.*, 158 Mass. 261. In an action to recover damages arising from a change in the grade of a street, a photograph of plaintiff's premises, testified to by him as being as perfect as possible, is admissible in evidence to show the location and surroundings of such premises, and to aid the jury in determining how they are affected by the change in the grade of the street: *Church v. Milwaukee*, 31 Wis. 512. In an action to recover for damages done to a house by the manner in which an adjoining house was built, photographs of the house are admissible when the jury can judge of their accuracy from the testimony in the case: *Dorsey v. Habersack*, 84 Md. 117. If, on trial to recover damages arising from the exercise of the right of eminent domain, an inspection of the premises in question is proper, but impracticable or impossible, a photographic view thereof is admissible in evidence as an aid to the jury: *Omaha Southern Ry. Co. v. Beeson*, 36 Neb. 361. In *Archer v. New York etc. R. R. Co.*, 106 N. Y. 590, the plaintiff offered in evidence a photograph representing, as he testified, the locus in quo of the accident where an injury was received, and he also testified that he did not take the picture himself nor did he know from what point it was taken. The photograph was admitted in evidence over an objection, and it was held on appeal no error, because the picture, if a fair representation of the premises, was admissible the same as a map or diagram. In *Bedell v. Berkey*, 76 Mich. 435, 15 Am. St. Rep. 370, it was held that testimony as to localities can generally be better understood by views and observation than by word of mouth, and changes can just as well be explained in the one case as in the other, and in a negligence case, where the jury are not permitted to view the premises, photographs shown to be true representations are admissible in evidence. Photographic sketches of the scene of an accident are admissible in evidence if correct representations of the locality and its surroundings,

and any change in the appearance of the locality arising from such views being taken at a different season of the year is open to explanation: *Dysen v. New York etc. R. R. Co.*, 57 Conn. 9, 14 Am. St. Rep. 82. In an action to recover for a personal injury, a photograph of a trestle and a wrecked train of cars, taken two hours after the accident occurred, and verified by the photographer as being a correct representation of the locality and scene, is admissible in evidence to aid the jury in properly understanding the case: *Kansas City etc. R. R. Co. v. Smith*, 90 Ala. 25, 24 Am. St. Rep. 753. And in an action of trespass against an adjoining proprietor for the wrongful act of opening holes in the walls of plaintiff's cellar, so as to render it untenable, a photographic view of the cellar was properly admitted in evidence as an appropriate aid to the jury in applying the evidence: *Cozzens v. Higgins*, 33 How. Pr. 436. In an action of trespass for obstructing a driveway a photograph of the structures is admissible in evidence to assist the jury in understanding the case, if verified by proof that it is a true representation: *Randall v. Chase*, 133 Mass. 210. Photographs of the scene of a personal injury are admissible in evidence as an aid in the investigation of an action to recover damages for an injury, when they bear evidence on their face of the correctness of their representation of the scene depicted, in clearness of delineation, sharpness of outline, correct perspective, and in the just proportion between the various objects: *Nies v. Broadhead*, 75 Hun, 225. And the difference between the images produced upon a photographic plate and upon the human eye does not render photographs of the place where an accident has occurred inadmissible in evidence, but bears only upon the effect of such evidence: *Scott v. New Orleans*, 75 Fed. Rep. 373. The following cases serve to illustrate the rule that photographs, in order to be admissible in evidence, must be supported by proof that they are correct resemblances or true representations of the subject in dispute. If not so verified, they are not admissible. Thus, in *Cleveland etc. Ry. Co. v. Monaghan*, 140 Ill. 474, an action against a railroad company to recover damages for negligence resulting in the death of plaintiff's intestate at a highway crossing, in which the leaving of cars standing on a side-track so as to obstruct the view of approaching trains was claimed as the ground of negligence, the defendant offered in evidence photographic views of the locality where the accident happened, taken by an amateur some two months thereafter. The person taking such views had never visited the scene before, and there was no proof that they correctly represented things as they were when the accident happened, and it was held that they were not admissible in evidence. To the same effect: *Goldsboro v. Central R. R. Co.*, 60 N. J. L. 49; *Threlkeld v. Wabash Ry. Co.*, 68 Mo. App. 127. If, in an action to recover for an injury, it becomes material to show the location of a path existing two years before and at the time of the accident, and there is evidence of changes in the situation, and that the lot on which the accident occurred had been fenced shortly there-

after, a photograph taken shortly before the trial is not admissible whether offered as substantive evidence or as an unauthorized map: *Hampton v. Norfolk etc. R. R. Co.*, 120 N. C. 535. Photographic views of a culvert and the land in the vicinity, taken over a year after the alleged unlawful obstruction of the flowage of water therein, and offered in evidence upon the trial of a suit for such obstruction, without proof of their accuracy, are properly rejected: *Leidlein v. Meyer*, 95 Mich. 586. On the question of damages to mill property caused by the bursting of a reservoir dam, a photograph of a gully half way between the reservoir and the mill, and a mile and a half distant from each, taken after the occurrence, and offered in evidence, without proof of the previous condition of the gully, or of facts necessary to make it a measure of the volume and force of the escaping water, is not admissible in evidence to show such facts: *Verran v. Baird*, 150 Mass. 141. In an action to recover for injury received in a street-car accident, a photograph of another street-car offered in evidence under a proposal to show that it is an exact representation of the car upon which the accident happened is properly rejected: *People's Passenger Ry. Co. v. Green*, 56 Md. 84. The rejection of a photographic view of premises, the boundaries of which are in dispute, and upon which a trespass is alleged to have been committed, furnishes no ground of exception if offered simply as a "chalk representation," without being verified by the photographer, although the evidence of other persons is offered to show its correctness: *Hollenbeck v. Rowley*, 8 Allen, 473. No exception lies to the exclusion of photographs as evidence, if, so far as is shown, their rejection is on the ground that the person offering them has failed to make out the preliminary matters of fact necessary to make them admissible: *Harris v. Quincy*, 171 Mass. 472. And preliminary questions of fact as to the verification of photographs necessary to be shown in order to make them admissible are addressed to the discretion of the trial court, and his decision is not subject to exception nor review on appeal, unless such discretion has been grossly abused: *Cleveland etc. R. R. Co. v. Monaghan*, 140 Ill. 474; *Verran v. Baird*, 150 Mass. 141; *Goldsboro v. Central R. R. Co.*, 60 N. J. L. 49.

Physical Condition.—If the physical condition of the plaintiff or his injury is the subject of inquiry before the court, a photograph of such injury or its consequences is admissible in evidence if taken recently and shown to be a correct representation of such injury. Thus, in an action to recover damages for personal injury alleged to have been caused by the negligence of a railroad company, a photograph of plaintiff showing the manner in which his limbs had contracted, as a result of the accident, if proved by a witness that it was taken in his presence and correctly represented the condition of such limbs, is admissible in evidence on the same principle as a map or diagram: *Alberti v. New York etc. R. R. Co.*, 118 N. Y. 77; *Cooper v. St. Paul etc. Ry. Co.*, 54 Minn. 379. In an action to recover for

the negligent treatment of a child while in a children's asylum, photographs of the child showing its physical condition before and after it was received into such asylum are competent evidence: *Cowley v. People*, 88 N. Y. 464, 38 Am. Rep. 464. And in an action for damages for negligently causing the death of an infant child it is competent in evidence of the probable future growth of such child to exhibit in evidence its photograph, when five years old, it having died at seven years of age: *Taylor etc. Ry. Co. v. Warner*, 88 Tex. 642. An X-ray photograph showing the overlapping bones of one of the legs of plaintiff broken by an injury for which suit is brought, taken by a physician and surgeon familiar with fractures and with the process of taking such photographs, who testifies that it is an accurate representation of the condition of the leg, is admissible in evidence: *Bruce v. Beall*, 99 Tenn. 303.

It is doubtful whether photographs ought to be admitted in evidence for the purpose of showing the health or strength of a person, as it is common knowledge that photographs may be taken, and are often taken, in such a way as to make the person appear younger or less infirm than he is or than he looks. Thus, a photograph offered in an accident case, if regarded as evidence of the plaintiff's physical condition, one year before the accident, is evidence of his condition at a time so remote that the court is justified in rejecting it, though it is accompanied by evidence that the physical appearance of the plaintiff has not changed in the meantime, especially when direct evidence of his apparent physical condition at the time of the accident can be produced: *Gilbert v. West End St. Ry. Co.*, 160 Mass. 408. In an action to avoid a life insurance policy for fraudulent representations of the insured concerning the state of his health, his photograph is not competent evidence for the purpose of showing his healthy appearance: *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306, 8 Am. St. Rep. 894. In an action to recover for personal injury a photograph of the plaintiff taken nine years before the trial is not admissible, as it is likely to mislead the jury as to the amount of damages by comparing the appearance of the plaintiff at the time the picture was taken with her appearance at the time of the trial, and such photograph affords no basis for her appearance at the time of the accident: *Rock Island v. Drost*, 71 Ill. App. 613. In a case where the recovery of the husband for an injury to his wife is limited to expenses for nursing, medical attendance, and loss of services and society, photographs of the wife's injured foot, which are unnecessary to show the material facts and have a tendency to arouse the sympathy of the jury, are not admissible in evidence: *Selleck v. Janesville*, 104 Wis. 570.

Paternity.—A photograph of the putative father, who is dead, if proved to be a good likeness of him, is admissible in evidence, on an issue as to the paternity of a child, for the purpose of comparison with the child in court: *Shorten v. Judd*, 56 Kan. 44, 54 Am. St. Rep.

587. A photograph of the deceased taken many years before the trial of a contest as to heirship is irrelevant and inadmissible, but a photograph of the deceased and the petitioner made shortly before the trial by bringing two negatives in juxtaposition and from them making a third, may, perhaps, be admissible to show a resemblance between the two, as bearing upon the question of paternity, but is entitled to very little weight in view of frequent marked resemblances between strangers and great dissimilarity between kindred: *Estate of Jessup*, 81 Cal. 408. Photographs of members of plaintiff's family are admissible in evidence when testified to as being correct likenesses, for the purpose of supporting statements as to race and appearance of such family: *Van Houton v. Morse*, 162 Mass. 414, 44 Am. St. Rep. 373. On the trial of a bastardy case, the defendant cannot introduce in evidence a photograph of a third person, deceased, in order that the jury may judge whether the plaintiff's bastard child resembles such third party or the defendant, when the circumstances under which the photograph is offered in evidence are not disclosed and there is no proof that it is a correct likeness of the deceased: *Farrell v. Weitz*, 160 Mass. 288.

Identification.—A photograph is admissible on the identity of a person who has passed under various names, since it is only another and more definite method of proving the appearance of the man: *United States v. Lot of Jewelry*, 59 Fed. Rep. 684. Photographs of a missing man alleged to be dead, and whose life insurance was sought to be recovered, were admitted in evidence, and witnesses permitted to testify that they saw in another state a man thought by them to be the original of such photograph after the time of his disappearance, in *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751. Photographs of persons found drowned, although not the most correct or perfect likenesses that could have been taken, when the reasons why the pictures are not more perfect are fully explained by witnesses, are admissible on the question of the identity of such persons, when they are the best likenesses that can be had: *Ruloff v. People*, 45 N. Y. 213. For the purpose of identifying a man, who is dead, with a person who is shown to have gone through the ceremony of marriage on a certain occasion, photographs of the deceased may be shown to those who witnessed the marriage ceremony: *Wilcox v. Wilcox*, 46 Hun. 82. And to show the identity of a man who passed by a certain name with a man passing by a different name in another place, a photograph of the former may be put in evidence and shown to a witness who knows the man bearing the latter name, and the witness may testify that he recognizes the person as the man he had known: *Udderzook v. Commonwealth*, 76 Pa. St. 340. A photograph of a person taken two years before his death, but identified by the parents as being an accurate photograph of their daughter just before her death, is admissible for the purpose of identification, and may be shown to a witness who saw the deceased under peculiar circumstances just prior to her death: *State v. McCoy*, 15 Utah, 136. A photograph of an absent

witness whose deposition is used on a trial cannot be offered for the inspection of the jury on the cross-examination of a witness who testifies that he has endeavored to find such absent witness; the identity of the latter cannot be thus established: *People v. Chin Hane*, 108 Cal. 597. The admission of photographs for the purpose of identifying the deceased and the accused in criminal cases will be treated in this note under the subhead "Criminal Cases."

Documents.—It is not a fact of which judicial knowledge may be taken that all the appearances of a written document are capable of such exact reproduction that the copy will fully represent the original. Preliminary proof of the exactness and accuracy of the copy is necessary in order to permit a photo-lithographic copy of an affidavit on file in a public office which cannot be produced on the trial to be admitted in evidence: *Geer v. Missouri etc. Lumber Co.*, 134 Mo. 85, 56 Am. St. Rep. 489. Photographic copies of instruments can be used only as secondary evidence on laying a proper foundation for the introduction of secondary evidence: *Eborn v. Zimpleman*, 47 Tex. 508, 26 Am. Rep. 319. A photographic copy of a forged note that has since become illegible is admissible in evidence to show the words of the note upon proof that it is an exact copy of such words, without expert proof of the process of taking it: *Duffin v. People*, 107 Ill. 113, 47 Am. Rep. 431. Photographic copies of letters are not admissible in evidence when the originals are not lost and can be produced, as such copies are only secondary evidence: *McLean v. Scripps*, 52 Mich. 214; *White Sewing Machine Co. v. Gordon*, 124 Ind. 495, 19 Am. St. Rep. 109. Photographic copies of public documents on file in the office of the government, and which cannot be removed, are admissible as the best evidence that the case admits of, with an authentication of their genuineness in the usual way by proof of handwriting: *Leathers v. Salvor Wrecking Co.*, 2 Woods C. C. 680. Photographic copies of field-notes of a survey were admitted "for what they were worth," in *Ayres v. Harris*, 77 Tex. 108. A photographic copy of a note was admitted in *Arthur v. Roberts*, 60 Barb. 580, and in *Duffin v. People*, 107 Ill. 113, 47 Am. Rep. 431.

Handwriting—Signatures.—Upon the issue of the genuineness of a signature, magnified photographic copies of this signature and of admitted genuine signatures of the same person are admissible in evidence if accompanied by competent preliminary proof that the copies are accurate in all respects except as to size and coloring: *Marcy v. Barnes*, 16 Gray, 161; *Rowell v. Fuller*, 59 Vt. 688; *Howard v. Russell*, 75 Tex. 176. Photographic copies of handwriting or of signatures are but secondary evidence at best, always requiring preliminary proof of their accuracy, and they are always inadmissible as evidence of the existence of the originals when the latter can be had: *McLean v. Scripps*, 52 Mich. 214; *Eborn v. Zimpleman*, 47 Tex. 508, 26 Am. Rep. 315. Consequently, when the disputed signature of a check is in court, as well as a large number of genuine ones, it is not error for the court to reject photographs of the disputed signa-

ture: *Crane v. Horton*, 5 Wash. 479. Photo-lithographic copies of a person's signature, the originals of which cannot be produced, are not admissible to prove the genuineness of a signature purporting to be that of the same person, in the absence of preliminary proof that such copies are exact and accurate in all respects, and the affidavit of the custodian of the originals that such copies are a true and literal exemplification of the originals is not sufficient: *Geer v. Missouri Lumber etc. Co.*, 134 Mo. 85, 56 Am. St. Rep. 489. A photographic copy, smaller in size than the original from which it was taken, and not shown to be an exact reproduction of the original, though in evidence, cannot be made the basis for the introduction of evidence by comparison of handwriting: *Houston v. Blythe*, 60 Tex. 506. A photographic copy of a duplicate of the contract sued on was read in evidence as part of the deposition of the party defendant who signed the contract, and to such photographic copy the name of the other party defendant appeared as a witness. He testified that he was ignorant of the existence of the contract for several months after its date, and denied his signature as in the photograph. The court held that such photographic copy could not be used as a basis of comparison of handwriting, although other witnesses testify that in their opinion such photographic signature is an exact copy of the genuine signature of such defendant: *Buzard v. McAnulty*, 77 Tex. 438.

Criminal Cases—Scene of Crime.—Photographs are admissible in evidence in criminal cases under the same rules governing their admission in civil cases, except, perhaps, greater latitude is allowed in the former than in the latter. Photographs are admissible in criminal cases upon the same principle that applies to diagrams or maps, which upon proof of their accuracy and correctness are admissible: *People v. Webster*, 68 Hun, 11-17. A photograph of the scene of the homicide taken soon thereafter, and proved to have been accurately taken, is competent evidence: *People v. Fish*, 125 N. Y. 136; *People v. Pustolka*, 149 N. Y. 570; *Commonwealth v. Chance*, 174 Mass. 245, ante, p. 306; *State v. O'Reilly*, 128 Mo. 597; *Shaw v. State*, 83 Ga. 92; *People v. Jackson*, 111 N. Y. 362. Thus, a photograph taken by a photographer who was present when the person was shot, of the window through which he was shot, and of him in bed in the position in which he was shot, is admissible in evidence on a trial for such shooting: *State v. Kelly*, 46 S. C. 55.

Photographs of the place where the homicide was committed are properly admitted in evidence on a trial for such killing when it is shown that there is no material change in the place during the interval elapsing between the day when the murder was committed and the day on which the place was photographed: *Keyes v. State*, 122 Ind. 527; *People v. Buddensieck*, 103 N. Y. 487, 57 Am. Rep. 766. On a murder trial, photographs taken only three hours after the homicide, showing the condition of the premises at the time of the discovery of the crime, and verified to the satisfaction of the court,

are admissible in evidence to assist the jury in understanding the situation of affairs at the time and place of the commission of the crime: *Commonwealth v. Robertson*, 162 Mass. 91. But photographs which are mere artistic reproductions of situations planned by the chief witness for the state, and not simply accurate representations of the scene of the crime, are not admissible, although taken at the place of the homicide. Their admission is prejudicial to the accused, and sufficient to work a reversal of the judgment of conviction: *Fore v. State*, 75 Miss. 727. Photographs of premises wherein a homicide was committed, showing the locality of blood stains, made by an artist who testifies to their accuracy from his personal knowledge and observation, are admissible in evidence: *People v. Johnson*, 140 N. Y. 350.

Photographs of Deceased Persons.—On a trial for murder, the photograph of the murdered man is admissible in evidence on the question of his identity: *Wilson v. United States*, 162 U. S. 613; *Malachi v. State*, 89 Ala. 134; *Udderzook v. Commonwealth*, 76 Pa. St. 340; *Beavers v. State*, 58 Ind. 530-535; *State v. Windahl*, 95 Iowa, 470; *Manan v. State*, 20 Neb. 234, 57 Am. Rep. 825. Upon a murder trial photographs taken after death of persons whom it is material to identify may be exhibited to witnesses acquainted with such persons in life as aids in the identification: *Ruloff v. People*, 45 N. Y. 213. A photograph, shown by the widow to be a good likeness of her husband, and an indorsement thereon in his handwriting of his name, the date and place of execution of the picture, are admissible in evidence to show the identity of the husband and the murdered man, when offered in connection with the evidence of the photographer that it is the likeness of a man of the same name as the husband, taken at the place and about the time indorsed on it: *Luke v. Calhoun Co.*, 52 Ala. 115. On a trial for murder where the sister of the deceased testifies that a photograph offered in evidence was a fair representation of the deceased sister at the time of her final disappearance, the picture is admissible in evidence, though taken two or three years prior to the time of the trial: *People v. Durrant*, 116 Cal. 182. On a murder trial a full length photograph of the deceased is admissible to rebut testimony that the prisoner was a smaller man than the deceased if the witness who identifies the photograph testifies to its accuracy: *Commonwealth v. Keller*, 191 Pa. St. 122. If a witness who has seen the dead body of the deceased gives testimony tending to show that he has seen the same man alive subsequent to the time when, according to theory of the prosecution, he had been killed by the defendant, and he identifies a photograph of the brother of the deceased as resembling the man he saw, there is no error in receiving in evidence a true photograph of the deceased: *State v. Holden*, 42 Minn. 350. A photograph of the deceased was admitted in evidence for the consideration of the jury as an aid in determining whether it was to be believed that the defendant was in danger at the time of the homicide. Exceptions were taken to the reception of the photograph for that purpose,

but the court on appeal held such exceptions to be untenable, because when self-defense is the plea in such case the physical characteristics of the person slain are proper matter of proof, and that as showing them such photograph was properly admitted: *People v. Webster*, 139 N. Y. 73. A photograph of the head and neck of the decedent showing the wound which killed him is admissible on a murder trial if proved to have been accurately taken: *People v. Fish*, 125 N. Y. 136. And on a trial for murder by cutting the throat a photograph of the wound is competent evidence: *Franklin v. State*, 69 Ga. 36, 47 Am. Rep. 748.

Photographs of the Accused sufficiently verified to be admitted in evidence are properly admitted for the purpose of showing that when it was taken the defendant wore side whiskers, and thus contradicting witnesses who have testified to the contrary: *Commonwealth v. Morgan*, 150 Mass. 375. Evidence of defendant's personal appearance, shown by a photograph taken two years before the date of the alleged offense, and also at the time of his arrest, is admissible upon the question of identity: *Commonwealth v. Campbell*, 155 Mass. 537. A photograph taken of the accused soon after his arrest is admissible in evidence to explain his then appearance and his changed aspect at the trial: *State v. Ellwood*, 17 R. I. 763. In order to corroborate the testimony of a witness and to establish the identity of the defendants, photographs of them are properly received in evidence: *People v. Smith*, 121 N. Y. 578.

Other Cases.—On the trial of an indictment for importing women for the purpose of prostitution, two photographs found in the possession of one of the defendants at the time of his arrest, if considered by the jury to be pictures of any of the women named in the indictment, are admissible in evidence to show the connection of the defendant with such women: *United States v. Pagliano*, 53 Fed. Rep. 1001, 1004. A ferrotype of the plaintiff, taken shortly after an assault and battery upon him, and showing his injuries, after being properly identified, is admissible in evidence, and the weight to be given to it is a question for the jury to determine: *Reddin v. Gates* 52 Iowa, 210. On the trial of one of several defendants for larceny it is proper to admit in evidence the photograph of one of the other defendants, when properly identified by a witness who has seen the original, to prove the fact, in connection with other testimony, that the defendant stole the money while the original of the photograph occupied the attention of the bank officer: *Commonwealth v. Connors*, 156 Pa. St. 147.

UNION CENTRAL LIFE INSURANCE CO. v. TILLERY.

[152 MISSOURI, 421.]

VENDOR AND PURCHASER—BUILDINGS PASS BY SALE—"Land" includes all buildings of a permanent nature standing thereon, and, as between the vendor and vendee without notice that they belong to some other person, they pass with the land.

LANDLORD AND TENANT—BUILDINGS—RIGHT TO REMOVE.—If there is a contract between the landlord and tenant that the tenant may erect buildings at his own expense with the privilege of moving them at any time during his lease, they do not, as between the landlord and tenant, become part of the land, and may be moved off the leased premises by the tenant during the continuance of the lease, as they continue to be personal chattels and the property of the person who causes them to be built.

LANDLORD AND TENANT—BUILDINGS—RIGHT OF PURCHASER TO.—If leased land is sold to a purchaser without notice that the lessee has erected buildings thereon and reserved the right to remove them during the term of his lease, such buildings pass with the land to such purchaser.

LANDLORD AND TENANT—BUILDINGS—RIGHT OF PURCHASER UNDER FORECLOSURE.—If a tenant erects buildings on the leased land under agreement with his landlord that he may remove them on the termination of the lease, and such agreement is not recorded, such buildings pass with the land to a purchaser thereof at foreclosure sale without notice of such agreement and the tenant is not entitled to remove them.

Moore & Williams, for the appellant.

Wood & Wood, for the respondent.

423 **BURGESS, J.** This is an action for injunctive relief, the object being to restrain the removal by defendant of a dwelling-house, stable, shed, and corn-crib from a certain tract of land in Moniteau county of which plaintiff was the owner.

A temporary injunction was granted by the judge of the circuit court of that county, but which, after answer filed by defendant, in which he alleged that he had the right to remove the buildings under his contract with Burke, under whom he held possession, was dissolved, and the petition dismissed. Plaintiff appeals.

Plaintiff acquired title to the land upon which the buildings were situated under the foreclosure sale of a deed of trust, executed on the fifteenth day of September, 1892, by one Edmund Burke and wife, upon that and other lands, and by a quitclaim deed from said Burke to it, executed on the fifteenth day of January, 1896, the same day upon which the sheriff who sold the land to plaintiff under the foreclosure sale executed to plaintiff a deed for the land under that sale.

The quitclaim deed from Burke to plaintiff contains the following: "And the said Edmund Burke hereby promises ⁴²⁴ and agrees to deliver full and absolute possession of all the above-described real estate on the first day of March, 1896, to the party of the second part."

On December 8, 1894, defendant was a tenant of Edmund Burke and in the occupancy of the land upon which the buildings in question were erected, and on that day entered into a written contract with him by the terms of which he was to erect the buildings in question thereon, and to have the privilege of removing the same from the land under the terms and conditions of the contract. The contract provides as follows: "If at any time said Burke should desire that I discontinue to occupy said four acres, I am to receive three hundred and sixty days' notice in order to require me to surrender the possession thereof. But being aware of the fact that said land has been conveyed by deed of trust to J. R. Clark for the benefit of the Union Central Life Insurance Company of Cincinnati, Ohio, it is distinctly understood that if at any time said Burke should be required by any agreement made by him with said insurance company to surrender said land to said insurance company then I am to abide by said agreement that said Burke may make with said insurance company, and at any date Burke may agree to surrender said premises to said insurance company, or that said Burke may be compelled to surrender the same, then my lease of said premises shall cease, and on or before the date of said agreement to surrender I agree to surrender the premises so leased to said Burke without notice, and I hereby accept the possession of said premises with that understanding."

The contract between Burke and defendant was not recorded, and plaintiff knew nothing of it until it was introduced in evidence at the trial of this case. Defendant erected the buildings at his own expense. The evidence showed that he had moved the dwelling-house at the time the injunction was granted, and was about to remove the other buildings.

At common law, land includes all buildings of a permanent ⁴²⁵ nature standing thereon, and as between vendor and vendee without notice that they belong to some other person they pass with the land, but as between lessor and lessee, when there is a contract between the landlord and tenant, as in this case, by which it is agreed that the tenant may erect buildings at his own expense with the privilege of moving them at any

time during his lease, then they do not, as between the landlord and his tenant, become a part of the land and may be moved off the leased premises by the tenant during the continuance of the lease, as they continue to be personal chattels, and the property of the person who builds them: *Goodman v. Hannibal etc. R. R. Co.*, 45 Mo. 33, 100 Am. Dec. 336; *Lowenberg v. Bernd*, 47 Mo. 297; *Hines v. Ament*, 43 Mo. 298; *Priestley v. Johnson*, 67 Mo. 632.

The buildings in controversy were erected upon the land before plaintiff became the purchaser of it under the foreclosure sale, and while defendant had the unquestionable right, as between himself and his landlord Burke, to remove them from the land within the time prescribed by the contract between them, in the absence of notice by plaintiff of the contract at the time of its purchase of the land upon which the buildings stood, they passed to plaintiff as being part of the realty. Thus in *Curry v. Schmidt*, 54 Mo. 517, it is said: "So, if a mortgagor erects improvements or attaches fixtures to the mortgaged premises, they become the property of the mortgagee for the payment of his debt: *Butler v. Page*, 7 Met. 40, 39 Am. Dec. 757. And if, at the time of a sale under a deed of trust, the fixtures are attached, they pass by the sale, and, if removed after the sale, and before a deed is made, replevin will lie by the purchaser": Citing *Sands v. Pfeiffer*, 10 Cal. 258; *Cohen v. Kyler*, 27 Mo. 122.

So in the case at bar, as plaintiff had no notice of the contract between defendant and Burke, at the time it acquired title to the land upon which the buildings were, defendant occupied no more advantageous position toward plaintiff ⁴²⁶ with respect to said buildings than Burke did, and, as he could not have removed said buildings without the permission of plaintiff, it logically follows that defendant could not do so.

For these considerations, the judgment will be reversed, with directions to the court below to enter up judgment perpetuating the injunction.

Gantt, P. J., concurs.

Sherwood, J., absent.

REAL PROPERTY—BUILDINGS ON ANOTHER'S LAND.—It is competent for parties to agree that buildings shall remain the personal property of him who erects them: *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211, 43 Am. St. Rep. 491. See, also, *Newhoff v. Mayo*, 48 N. J. Eq. 619, 27 Am. St. Rep. 455; *Cross v. Wear* Commission Co., 153 Ill. 490, 46 Am. St. Rep. 902.

REAL PROPERTY—FIXTURES.—The character of property as real or personal may be fixed by contract with the owner of the real estate when the article is placed in position, but such contract cannot affect the rights of a mortgagee or purchaser without notice: *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 15 Am. St. Rep. 235. Fixtures become part of the realty so as to pass to a bona fide purchaser thereof who has no notice of the interest of a third person therein: *Tibbets v. Horne*, 65 N. H. 242, 23 Am. St. Rep. 81.

Cox v. BOYCE.

[102 MISSOURI, 570.]

ESTATES—CURTESY.—RIGHT OF SEISIN during coverture is essential to an estate of curtesy initiate. If the remainderman dies before the life tenant, the husband of such remainderman cannot claim an estate by curtesy in his wife's land after the death of the tenant for life.

JUDGMENTS—COLLATERAL ATTACK.—If the subject matter of adjudication is of a kind over which the court has no jurisdiction, its judgment is a nullity, and may be treated as such even in a collateral attack.

JUDGMENTS—COLLATERAL ATTACK.—If the court had jurisdiction of the subject matter, and it appears on the face of the record that the proper parties were before it and that it proceeded within its lawful bounds, the judgment can be attacked only directly and not collaterally. This rule applies to the judgments of probate courts.

JUDGMENTS—COLLATERAL ATTACK—RESIDENCE OF MINOR.—Unless it appears on the face of the record that the minor, for whom the probate court has appointed a guardian, was not a resident of the county, the appointment cannot be attacked collaterally on the ground of the nonresidence of such minor.

INFANTS—DOMICILE OF.—If a father has surrendered his child to her grandfather and the latter stands in loco parentis toward her, the residence of the grandfather is the residence of such child.

JUDGMENTS—GUARDIAN'S SALE—COLLATERAL ATTACK.—If the probate court of the county in which a minor resides takes jurisdiction of his estate and appoints a guardian, and, after such minor's removal to another county, the probate court thereof takes jurisdiction of the minor and his estate, and orders his real property sold, such sale cannot be collaterally attacked on the ground of the exclusive jurisdiction of the first court, when nothing appears on the face of the record of the second court showing that the minor was a nonresident of that county or that the court acted without jurisdiction.

Martin & Woolfolk, for the appellants.

Norton, Avery & Young, for the respondent.

MR. VALLIANT, J. This is an action of ejectment, coming from the circuit court of Lincoln county.

The plaintiff claims the land in suit as sole heir of his deceased infant child, who was the sole heir of her deceased mother, who was the wife of plaintiff. Defendant claims under a deed from the child's curator made under judgment of the probate court of Howell county. The case turns on the question as to the validity of that deed.

There is an equitable defense set up in the answer, but, as the case will be disposed of before we reach that defense, it will be unnecessary to set it out in this statement.

The land came from Joseph Hunter, who was the great-grandfather of the plaintiff's deceased child, through whom he claims. Joseph Hunter died in 1877, leaving a will ⁵⁸⁰ whereby he devised his land to his wife for life, remainder to his nine children, and their heirs. One of these children died leaving two children, of whom plaintiff's wife was one, who therefore inherited one-half of one-ninth, subject to her grandmother's life estate, and, dying in 1884, before her grandmother, the descent was cast on her child, who inherited the estate in expectancy, subject to her great-grandmother's life estate. This great-grandmother died in 1890, whereupon the life estate ended, and the remaindermen were entitled to possession.

After the death of his wife, in 1884, the plaintiff took his child, then but a few months old, to her maternal grandfather, Samuel Slater, and gave her to him to keep and care for, and he did so, the child living with him until her death in 1893. When the child was first given to Slater in 1884 all the parties named resided in Lincoln county. In July of that year the probate court of Lincoln county appointed Slater curator of the estate of the child and he qualified as such, but the child had no estate except her expectancy in this land. Later in the same year Slater moved to Howell county, and carried the child with him, where they resided until her death in 1893, and where he continued to reside. The records of the probate court of Lincoln county show no proceedings in the matter of the curatorship after the appointment. In 1891, after the death of the great-grandmother and the termination of the life estate, the child being then entitled to possession of her share of the land, the probate court of Howell county appointed Slater curator of the child, he qualified as such, and regular proceedings in that matter were thereafter had in that court, in the course of which the court ordered the curator to sell his ward's interest in the land, which he did and made the deed under which defendants claim. The regularity of the

proceedings in the probate court of Howell county are not questioned, but the point is made that those proceedings, though regular on the face of the ⁵⁸¹ record, were coram non iudice because the probate court of Lincoln county had already taken jurisdiction of the matter when the parties were resident there, and had appointed a curator who had not been discharged. That is the real point of contention in this case.

The trial was by the court without a jury and the finding and judgment were for the plaintiff, from which this appeal is regularly taken.

1. From the written opinion filed in the case by the learned trial judge it appears that whilst in his opinion the judgment of the Howell county probate court was not subject to the collateral attack made on it, yet the plaintiff was entitled to recover because he had an estate by the curtesy in the land, basing the conclusion on the decisions in *Reaume v. Chambers*, 22 Mo. 36, and *Stephens v. Hume*, 25 Mo. 349. In those cases it was decided that an estate by the curtesy initiate did not depend on actual seisin during coverture, for the reason that under our law actual seisin in the ancestor is not necessary to cast descent. But the right of seisin during coverture is essential to an estate of curtesy initiate. The law on this subject is discussed and clearly shown in *Martin v. Trail*, 142 Mo. 85. Therefore, since the plaintiff's wife died during the lifetime of her grandmother, who was a life tenant under the will of Joseph Hunter, there was no right of possession during the coverture, and hence no estate of curtesy.

2. But the point of plaintiff's chief reliance is in his proposition that the probate court of Howell county was without jurisdiction, and all its proceedings in this matter void. It is a well-settled doctrine that if the subject of the adjudication is of the kind of which the court has no jurisdiction, its judgment is a nullity and may be treated as such, even in a collateral attack. But if it is a subject of the kind of which the court has jurisdiction, and it appears on the face of the record that the proper parties were before it and that it ⁵⁸² proceeded within its lawful bounds, the judgment cannot be impeached except in a direct attack.

The probate courts of this state, though they are of limited, are not of inferior, jurisdiction, and when they have acted within their limits, their judgments "are entitled to the same favorable presumptions as are accorded to courts of general jurisdiction, and are no more subject to collateral attack": *Sherwood v. Baker*, 105 Mo. 475, 24 Am. St. Rep. 399.

There is no difference between the learned counsel in this case on these propositions, but they differ in their application of them to the facts of this case.

This is a collateral attack on the judgment of the probate court, and cannot prevail unless it appears that the court was without jurisdiction of the case. Sometimes the question of jurisdiction in a particular case is a question of venue, and that may be a question of fact to be decided in the first instance by the court whose jurisdiction is invoked. Probate courts have jurisdiction to appoint curators for minors to administer their estates. When application for the appointment of a curator is made, the probate court is to satisfy itself if the minor is a resident of the county, and if the court makes the appointment the presumption is that it heard the evidence and found the fact to justify its appointment. Unless it appears on the face of the record that the minor was not a resident of the county, the proceedings of the probate court cannot be attacked collaterally on that ground. In *Lacy v. Williams*, 27 Mo. 282, cited by counsel for plaintiff, the court say: "The county court of Polk county had no authority to appoint a curator for children who were not residents of the county. The order of appointment was void, and may be treated as a nullity in a collateral proceeding." It would appear from the report of that case that the fact that the children did not reside in Polk county was shown on the face of the record of the county court. However that may be, there was really no occasion for the court to say that the ~~was~~ appointment was a nullity and could be so treated in a collateral attack, because that was a direct proceeding in the county court to vacate its order appointing the curator, and that court did rescind it.

Garrison v. Lyle, 38 Mo. App. 558, was also a direct proceeding, begun in the probate court to vacate the order appointing the curator on the ground that the minor did not reside in the county. *Marheineke v. Grothaus*, 72 Mo. 204, was a contest between two curators as to which was entitled to the management of the estate, the one having been appointed by the probate court of St. Louis county, and the other by the probate court of Franklin county. What is said, therefore, in those cases as to the proper venue or jurisdiction as governed by the venue is no authority for a collateral attack on the judgment in question in this case. *Starbuck v. Murray*, 5 Wend. 148, 21 Am. Dec. 172, is also cited in support of plaintiff's contention. That was a suit in New York on a foreign judgment which

recited that the defendant had appeared in the case; he filed a plea denying the fact, and denied the jurisdiction of the foreign court of his person, and the New York court held that it was a good plea. But that was no collateral attack.

It appears from the evidence here that this child was in fact residing in Howell county when the probate court there made the appointment. True, the child's father at that time resided in Lincoln county, but the evidence shows that he had surrendered the child to her grandfather, and that the latter stood in loco parentis toward her, and therefore his residence was her residence.

It is contended that the probate court of Lincoln county had in 1884 appointed this same person curator for the child, and that therefore the act of the probate court of Howell county was void. If there was a valid appointment and an existing curator under the jurisdiction of the probate court of Lincoln county that might be sufficient cause in a direct proceeding ⁵⁸⁴ to rescind the appointment in Howell county; whether such rescission would affect rights acquired under the administration of the Howell county court would be a question for the court making the decree. But such fact cannot be shown in a collateral proceeding to annul the judgment of the Howell county court which is fair and regular on its face, and to vacate a deed having all the appearance of having been executed under the sanction of a court of competent jurisdiction of such matters: *Johnson v. Beazley*, 65 Mo. 256, 27 Am. Rep. 276; *Rowden v. Brown*, 91 Mo. 429. Since, so far as can be determined in a suit of this kind, all the title that the plaintiff's child ever had to this land passed under the curator's deed, there is no necessity for a retrial of this cause.

The judgment is reversed and the cause remanded to the circuit court of Lincoln county, with directions to enter judgment for the defendants.

All concur.

COURTESY—NECESSITY OF SEISIN.—A husband cannot be tenant by the curtesy of lands of which the wife was never seised: *Bogy v. Roberts*, 48 Ark. 17, 3 Am. St. Rep. 211.

JUDGMENTS—COLLATERAL ATTACK.—A judgment of a court having jurisdiction of the parties and of the subject matter cannot be impeached collaterally: *Hall v. Sauntry*, 72 Minn. 420, 71 Am. St. Rep. 497. See further on collateral attack upon judgments, the extended note to *Morrill v. Morrill*, 23 Am. St. Rep. 104-118.

JUDGMENTS—PROBATE COURTS.—The orders and judgments

of probate courts acting within their jurisdiction are entitled to the same favorable presumptions and the same immunity from collateral attack as are accorded those of courts of general jurisdiction: *Sherwood v. Baker*, 105 Mo. 472, 24 Am. St. Rep. 399, and note. See, too, *Apel v. Kelsey*, 52 Ark. 341, 20 Am. St. Rep. 183, and note.

DOMICILE.—A CHILD acquires the domicile of its grandparents and loses that of its parents when after their death it takes up its residence with the former: *In re Benton*, 92 Iowa, 202, 54 Am. St. Rep. 546. See, also, *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196.

RICHARDSON v. SMART.

[152 MISSOURI, 622.]

CONTRACTS—CAPACITY OF MAKER—SICKNESS—PRESUMPTION.—If the alleged incompetency of the maker of a contract arises from the temporary sickness, resulting in intermittent conditions of sanity and insanity, and there is no prior incapacity alleged or proved, the usual presumption that when a state of facts is once shown to exist they must be presumed to have continued to exist until the contrary is shown has no application, and the burden of proof is upon the person challenging the legality of the act complained of to show that at the time that the act was done there was such incompetency.

GIFTS—CONFIDENTIAL RELATIONS—UNDUE INFLUENCE—BURDEN OF PROOF.—If the donee is a half-sister of the donor, but they live in different places and she does not stand in a confidential relation to him, although his favorite relative, the burden of proof is not upon her to explain why, during his last sickness, he made a gift to her instead of to his married daughter by a wife from whom he had been divorced.

WITNESSES.—CONSANGUINITY is not a disqualification of a witness nor proof of his perjury.

GIFTS—CAPACITY OF MAKER—DELIRIUM OF SICKNESS.—The fact that the donor had typhoid fever and on the day he made the gift, and for a few days preceding, manifested the intermittent delirium usually accompanying such disease, does not avoid the gift nor show that he did not have intelligence sufficient to know what he was doing at the time he made the gift.

APPEAL—FINDING OF FACT IN EQUITY CASES.—Much deference is due to the finding of facts by the trial court in equity cases, but such finding is not binding on the appellate court, and cannot be allowed to stand when clearly erroneous.

N. Frank, C. W. Bates, and D. Goldsmith, for the appellants.

Luke & Muench, for the respondent.

MARSHALL, J. This is a proceeding in equity to set aside a transfer of three shares of the capital stock of the Mechanics' Planing Mill, made by the owner, Thomas Gotham, on August 4, 1894, to his half-sister, Robyna Smart, the defendant, while he was sick with the typhoid fever from which

he died on the 29th of August, 1894, on the ground that while he was sick and in a dying condition and unconscious of his own acts, and incapable of performing any contract or business transaction or of intelligently disposing of his property, the defendant Robyna Smart conspired to get him, and did get him, to transfer the stock to her. This is really a scramble for this property between May Oehler, his daughter by his first marriage on the one side, and Robyna Smart, his half-sister on the other side.

The deceased first married in 1859, and his wife left him in 1861. After the separation the child, May, was born. Sometime afterward his wife secured a divorce from him, with the ^{custody} custody of the child, and about 1865 she was married again to C. H. Verborg, and May lived with her mother and step-father and was reared by them, and was commonly called by his name. She is now married to Mr. Oehler. The deceased's father died when he was young and his mother was married again to a Mr. Hambleton, and the defendant, Robyna Smart, is a child of that marriage.

At this term this court has considered and reviewed the principles of law applicable to cases of this character: *Sehr v. Lindeman*, 153 Mo. 276; *Tibbe v. Kamp* (not yet reported). It is not necessary, therefore, in this case to do more than to refer to those cases, so far as the principles of law are concerned, except, perhaps, to add that in cases where the alleged incompetency arises from temporary or sudden sickness resulting in intermittent conditions of sanity and insanity, and there is no prior incapacity alleged or proved, the usual presumption that when a state of facts is once shown to exist they will be presumed to have continued to exist until the contrary is shown has no application, and that the burden of proof is upon the party challenging the legality of the act complained of to show that at the time the act was done there was such incompetency: *Von De Veld v. Judy*, 143 Mo. 348; *Staples v. Wellington*, 58 Me. 459; *Hix v. Whittemore*, 4 Met. 547; *Ralston v. Turpin*, 25 Fed. Rep. 7; *Blake v. Johnson*, Millw. 166. The reason for which is that the delirium resulting from diseases is not always or usually continuous, but the patient has intervals when he is perfectly sane, and the brain disorder is only the reflex condition of some other diseased organ and is not itself the seat of the disease, or, if it is the disease, is not of a permanent or continuous character. These are natural facts known to all educated persons, and do not require the testimony of

experts to prove them. Of such is usually the character of the delirium in typhoid fever, and is one of the commonest symptoms of that disease. It is proper, also, at the outset to say ⁶²⁸ that this is not a case where the beneficiary stands in a confidential relation to the donor, and therefore the burden of proof is not shifted to her to explain why the gift was made. Mrs. Smart was the half-sister of the donor, and when he visited St. Louis he stayed at her house, and she seemed to be the favorite relative of his, but this does not bring the case within the exception to the rule that the burden of proof rests upon him who makes the charge because a confidential relation existed between the donor and donee. Neither can it be said that such a relation existed between the deceased and his uncle, Thomas Richardson, who prepared the assignment of the stock, for he was not the donee, and the fact that the deceased had previously sought his uncle's advice in business matters, had borrowed money from him by pledging this stock as security, or that he had left this stock in his uncle's custody, does not create a confidential relation between them, so as to bring Mrs. Smart within the exception to the rule and cast the burden of proof upon her. The only relation shown to exist between her and the deceased was that arising from being of the half blood, from her kindness to him and his preference for her, and this does not bring the case within the rule as to confidential relation, for if it did when a man did the natural thing and left his property to his relations, it would be regarded as so suspicious as to demand an explanation from the donees, but if he did the unnatural and unreasonable thing of giving his property to a perfect stranger, no such suspicion would attach, and the burden of the proof to show he was incompetent when he made the gift would be upon those who challenged the act. In *Tibbe v. Camp* (not yet reported), the cases in this state bearing upon this question were collated, and the exception to the rule because of the confidential relation of the donee, where the gift is of substantially all the testator's property, was pointed out.

It only remains to examine, scrutinize, and analyze the facts in this case and to apply the law, as so lately reviewed, in this state to the facts.

⁶²⁹ We approach the discussion of the facts in this case without any special respect for the domesticity of the deceased and without any sympathy for any of his relations. He was married twice and both wives left him in a very short time

after being married to him, and he was at outs with all of his half-sisters and brothers except Robyna. The record does not show who was at fault, but it reflects no special credit upon him that the two women tried to live with him and could not do so and that he hated his nearest kinfolks. His first wife's second husband ordered him away from their house when he went to visit his child born after the separation, although they accepted money from him whenever it was offered for the child, which, it is true, amounted to only the paltry sum of ninety dollars in her whole life. When his daughter, May, the real plaintiff herein, was about to be married he wanted to come and live with her, but her intended husband refused, and she, at least, acquiesced in the refusal, on the ground that they could not be friendly with him and her mother both. After the separation from the first wife and after his daughter became old enough to understand, he lived for years in the same city with her, and she did not know it, for after his death, at the trial of this case, she said he went to Montana in 1861, after the separation, and remained there until 1880. About five years before his death he became very angry with her because of her efforts to get him to transfer this stock to her at that time. When he was sick with typhoid fever in Clinton, Iowa, his relatives, who lived there, visited him for a few brief moments at intervals, and his own mother, who went there from St. Louis in response to a message from him that he wanted to see her on business, spent most of her time visiting relatives in the country, spent very little time either before or after the transfer of the stock with him, and one and all they left him at an improper place, entirely dependent upon strangers to nurse him and look after his sick wants, which the evidence discloses he was unable to do for himself at all times; his mother returned to St. Louis, leaving him suffering with typhoid fever, attended by a doctor they now say was a quack, and it finally devolved upon his lawyer to have him removed to the public hospital where he could get proper medical attention and suitable nursing. It is no wonder he died. The only wonder is that it took the fever from July 25th to August 29th to kill him, under such circumstances. It is true that toward the last his daughter went to Clinton and helped to nurse him until he died. Mrs. Smart, his half-sister, did not go near him at any time while he was sick, but she sent her daughter, Rebecca, there with his mother on the 20th of July (which was before he was taken sick), and they stayed until

the 8th of August, which was four days after the transfer was made, and four days before his lawyer had him removed to the hospital. In the light of this case is it to be wondered at that our earliest copybooks impressed upon our youthful minds what then seemed to be the cynical saying of Robert Burns, "Man's inhumanity to man makes countless thousands mourn"? Nor is this all. After roaming for years the deceased married a second time in 1892. In a short time his wife left him and sued him for maintenance. He also had financial losses, business reverses and other lawsuits. While so harassed his daughter and his half-sister were both trying to get him to transfer to them each for herself these shares of stock, ostensibly to put them out of reach of his second wife, and he had said he intended to give the stock to one or the other of them, saying to some of the witnesses he intended giving them to his half-sister because she had been "as true as steel to him, . . . would share her last crust with him," and that "her house would always be a home for him and his mother."

On the 25th of July he was taken sick with a congestive chill, followed by typhoid fever. He was not always confined to his bed, but laid on a lounge in his room—even drove to the bank and drew some money. He would not stay in the ⁶³¹ house, but went out several times; was found coming from the saloon with a bottle of beer and some milk, which he mixed, played with like a child, then put behind an old trunk in his room, saying the doctor told him to keep it in a dark place; was also found lying on the streets where he had taken his pillow and laid down, and was also found on another occasion lying in the gutter. He did not always recognize the people around him, did not always know the doctor, but mistook him for the sheriff (which in the light of the testimony in this case is not surprising), and wanted his lawyer sent for before the sheriff (doctor) put the manacles on him; insisted that he had a lawsuit which was set for trial in Chicago on the Monday following the transfer of the stock and that he must be there, when the fact was that he had such a suit pending in Chicago, but it would not be reached before the following February, as he had been advised by his lawyer; he would not always answer immediately or coherently, and would mistake the identity of persons who called to see him. It is true, as claimed by the plaintiff, that the doctor who attended him and the lady with whom he boarded, who seems to have been kind to him,

stated that on the morning of the day on which the transfer of the stock was made (August 4th) he was "very bad, and had high fever, with a temperature of from 96 to 103" (a fever with a temperature at 96), and that he had been in about the same condition from the time he was taken sick, on the 25th of July, but the lady was not offered as an expert on fever and the doctor could not be ranked very high, as he admitted he did not know what hyperaemia is, or what paranoia is, or whether it was a disease of the bowels or of the bones, but was sure that anaemia was "a condition of the secretive organs, the bowels," and defined it to be "passage from the bowels." On the other hand, it appears that on the 3d of August, the day before the transfer, he took a certificate of deposit out of his pocket and gave it to a friend who was visiting him, and asked him to go to the bank and draw five ⁶³² dollars of it, which his friend did and brought it to him with a new certificate for the balance, which was found in his clothing after his death and passed as assets to his administrator. About an equal number of witnesses on each side swear to his mental capacity; those for the plaintiff declaring him incompetent, and those for the defendant declaring him competent. Most of the witnesses did not see him on the day of the transfer, and the plaintiff seeks to discredit those for the defendant, because nearly all of them were relatives of the deceased and of the defendant, but none of them except Robyna are interested in this case or will be benefited a particle by its result. The only persons who were present when the transfer was made were his mother and uncle. His mother says that when she went to see him, accompanied by the daughter of the defendant, on the morning of August 4, 1894, he asked her to tell his uncle, Thomas Richardson, with whom he had left the stock, to bring him the shares of stock as he wanted to transfer them. She asked him to whom he intended to transfer them, and he replied she would find out later. His niece corroborates, substantially, this testimony. His mother says she went to see Mr. Richardson and delivered her son's message. Thereupon Mr. Richardson immediately wrote out the transfer on the back of each of the three certificates of stock (it appears each certificate was for only one share), leaving the name of the transferee blank, and also wrote out a blank power of attorney authorizing the transfer of the shares of stock on the books of the company. Then he and the mother of deceased went to see the deceased. When they arrived there the deceased asked his uncle if he had

the stock, and was informed that he had, and that the transfers had been prepared, and the uncle asked deceased whose name he should insert as the transferee, and the deceased said Robyna Smart. Her name was then written in the transfers and the power of attorney, and the deceased signed his name to all four papers in a firm handwriting, an inspection of which fails to disclose even a nervous ⁶³³ condition. Richardson took the acknowledgment of the deceased thereto and kept the papers by direction of deceased or his mother (it is not altogether clear which), and the mother and uncle left the house. On the Monday following (August 6th), the deceased asked if the stock had been sent to Robyna Smart, and finding it had not, directed that it be sent to her by mail, which was immediately done.

This appears to consist with the usual method of transferring stock and fails to indicate any lack of capacity on his part. If it took place as his mother and his uncle swear it did, it ends this case. They have no pecuniary interest whatever in falsifying the facts. They are not the donees. True, they are respectively the mother and uncle of the donee, but even consanguinity has never been considered a disqualification of a witness, much less proof of his perjury. In this connection it is proper to say that there is not a word of evidence to sustain the charge that Robyna Smart conspired with any person to procure, or that she did procure, the transfer of the stock to her. As before stated, both she and his daughter had been trying to get him to transfer it, but there is no evidence in this record that Robyna knew he intended to transfer the stock to her at the time he did; she was not present and knew nothing about it until after it was done.

We come back again, therefore, to the undisputed and unimpeached testimony of his mother and his uncle as to what he said and did when he actually made the transfer, and there is nothing shown which would support the charge that when the transfer was made he did not have intelligence enough to know what he was doing, what property he had, or who was to be the object of his bounty. The plaintiff, however, arrays against this the following conditions: 1. He had been sick with typhoid fever for eleven days before the transfer was made; 2. His fever had been raging and his temperature ranged from 96 to 103; 3. He mistook the identity of visitors whom he had known, more or less intimately; 4. He did not always ⁶³⁴ recognize the doctor, but at times he thought he was the sheriff, who had come to arrest and manacle him, and wanted his lawyer sent

for; 5. He was constantly asking to see his lawyers and said they had offices in a certain building, when their offices were not in that building at all; 6. He insisted that he had a case in Chicago which was coming on for trial on the following Monday, when the fact was he had such a case in Chicago but it would not be reached for trial before the following February; 7. He would not stay in the house, but on at least three occasions he left it, once taking his pillow and lying on the sidewalk, once saying he was going to a dance, and once going to a saloon, buying a bottle of beer and some milk, and, mixing them, "played with them like a child," and finally put them in a dark place in his room, saying the doctor told him to do so; 8. He insisted that his bowels were not acting, when in fact they acted without his being conscious of it; 9. He exposed himself without regard to who was present; and 10. He cursed. All of which he had not done when well and probably would not have done but for the delirium incident to the fever. But none of which proves anything more than what anyone suffering with such a fever might do when delirious. They simply illustrate the tricks and pranks that fever plays on the nerve centers and the brain.

All of these acts and conditions are consistent with the temporary maladies of the body and mind caused by severe sickness, which, while they last, incapacitate the person to perform a legal act, but they are not enduring or continuous, and hence the wisdom of the rule which requires proof of such a condition at the very time a challenged act was done. To hold that proof like this, without proof of the actual condition when the act was done, is enough to avoid the act, would be equivalent to holding that a person who was suffering with typhoid fever was incompetent to do any legal act, and this has never been so held by any court.

There is one fact in this case which should receive especial prominence. Before the deceased was taken sick at all he sent word to his mother that he wanted to see her on business, and that if she could not come to Clinton he would go to St. Louis. Accordingly, she went to Clinton, arriving there on July 20th, which was five days before he was taken sick. We are not told what the business was about which he was so anxious to see her, nor are we advised why it was not transacted before he was taken sick. Neither is there anything to show what business he had with reference to his mother. But when this incontestable fact is taken in connection with the only busi-

ness he is shown to have transacted thereafter with which his mother had any concern, it is no very great stretch of the imagination to connect it with this stock. His mother lived with his half-sister, Robyna, and he had said to strangers that he intended to transfer this stock to Robyna because she was as true as steel to him, would share her last crust with him, and he and his mother would always have a home with her. There is, therefore, a connection in his mind shown between the stock, his mother and Robyna, which is not true as to his child, for he had become angry with her about five years before because of her importuning him to give her the stock. This fact, taken in connection with the fact that he did transfer the stock to Robyna, and that this is the only business that it is shown or intimated that he transacted with his mother, evidences an intention on his part to transfer the stock to Robyna quite a while before he was taken sick, and shows that he had finally decided to whom he would give the stock. It also corroborates the uncontradicted testimony of his mother and Rebecca Smart, that he, himself, brought up the subject of the stock, and asked his mother to tell his uncle to bring him the stock as he wanted to transfer it, and also supports the testimony of his mother and uncle that he told his uncle to put Robyna's name in as the donee. It ^{also} goes to show that he did with his own what he had intended to do before he was stricken with the fever.

The plaintiff insists, however, that it is unreasonable to believe that he would strip himself of his best and most available asset when he was sick and needed money, especially as he expected soon to be well, and hence was not giving it away because he would have no further need for it. There is, of course, much force in this contention, but it comes with bad grace from the daughter, for she did not think of that when she was urging him to give her this stock. However, the record shows that he did not strip himself of his property, for he had money in the bank, five dollars of which he had drawn the day before, and he had a certificate of deposit for the balance in his pocket. His administrator has also realized some eight hundred dollars from other property he owned beside this stock. It may have been that he expected to get well and thought he had enough left without this stock to take care of himself, or that if he gave this stock to Robyna he would always have a home with her—he knew he could not have a home with his daughter, for that had been refused him when he proposed it—or he may have be-

lieved he would not have need for any money very long, and that if he did not give this stock to Robyna before he died or leave it to her by will she would not get it, but that it would pass to his daughter, and so he arranged it himself as he wanted it. There is as much foundation for one theory as there is for the other.

The sum of the whole matter is that it was his property. He had a right to do what he pleased with it. He is not shown by this record to have been incapable of knowing what he was doing. He has acted, and what was said in reference to a will by the supreme court of Michigan applies equally as well here. "If a man's acts, by reason of such incidents as have been shown in this case, make such acts the subject of post-mortem determination, dependent upon the whims or ⁶³⁷ caprices of a jury, then it may well be said by him who wishes to convey his property, 'I wish my property to go so and so, and hope that a jury will, upon the subject, think the same as I do and confirm my act': Lynch v. Doran, 95 Mich. 409.

This is the second suit based upon this controversy. In the first case the plaintiff obtained judgment, but on appeal the St. Louis court of appeals reversed the judgment and dismissed the bill without prejudice: Richardson v. Smart, 65 Mo. App. 14. Then this suit was begun. Upon a trial again in the circuit court, the evidence being almost the same as on the trial of the first case, the plaintiff again obtained judgment and defendant appealed to this court. It is now urged that this court should not interfere with the judgment, because two nisi prius judges have found the facts in favor of the plaintiffs, and they had a better opportunity of seeing the truth because the witnesses were before them. Much deference is properly shown to the finding of facts by the trial court in equity cases, but such finding is not binding on the appellate courts. In this case much of the most important testimony was presented to the trial court in the shape of depositions, so that as to such testimony the trial judge was in no better condition than this court. But ultimately the responsibility for the judgment rests with the appellate court, and no judgment can stand that does not meet with its approval. Such is the policy of our jurisprudence and the genius of our government. We have been compelled to reach the conclusion that the judgment of the circuit court is erroneous, and it is, therefore, reversed, and we leave the property where its owner put it.

It is so ordered.

All concur.

INSANITY—PRESUMPTION AS TO CONTINUANCE.—Mental disease, when established, will be presumed to continue; but this rule has no application when the deranged condition of mind is a result of disease and temporary: See extended notes to *McMechen v. McMechen*, 41 Am. Rep. 686, 687; *Cochran's Will*, 15 Am. Dec. 117.

UNDUE INFLUENCE—PRESUMPTIONS AS TO.—On this subject as related to gifts, contracts, and conveyances, see the extended note to *Richmond's Appeal*, 21 Am. St. Rep. 101-104. In case of a will contest, the burden of proving undue influence rests upon the contestants: In *re Hess*, 48 Minn. 504, 31 Am. St. Rep. 665; but when undue influence is shown to exist, every gift from the weaker party to the stronger is presumptively tainted: *Gay v. Gillilan*, 92 Mo. 250, 1 Am. St. Rep. 712.

APPEAL—FINDINGS.—IN AN EQUITY CASE, the appellate court may set aside a finding of the lower court which is manifestly against the preponderance of evidence: Note to *Savannah etc. Ry. Co. v. Flannagan*, 14 Am. St. Rep. 188.

CASES
IN THE
SUPREME COURT
OF
MONTANA.

**MERCHANTS' NATIONAL BANK v. GREAT FALLS
OPERA HOUSE COMPANY.**

[28 MONTANA, 82.]

SURETYSHIP — ASSIGNMENT OF JUDGMENT — CONTRIBUTION.—A surety who has paid a judgment against himself and his cosureties may take an assignment of it to himself and avail himself of it to enforce contribution from his nonpaying cosureties.

SURETYSHIP—CONTRIBUTION—STATUTORY REMEDY CUMULATIVE.—The summary proceeding by which, under the Montana Code of Civil Procedure, section 1242, a surety may enforce contribution from his cosurety under a judgment against them as such, is cumulative and not exclusive, and such surety may proceed to obtain relief by any recognized mode of procedure.

SURETYSHIP — SATISFACTION OF JUDGMENT — RELEASE OF COSURETY.—An entry of satisfaction of judgment against several cosureties, which judgment has been assigned to one of the sureties, who has paid it, to be kept alive by him for the purpose of enforcing contribution, does not inure to the benefit of a nonpaying cosurety, unless the intention was thereby to discharge him.

SURETYSHIP — SATISFACTION OF JUDGMENT—CONTRIBUTION.—EVIDENCE that a surety, who has procured the satisfaction of a judgment against himself and his cosureties, which has been assigned to him for the purpose of enforcing contribution, did not intend to satisfy the judgment as to the nonpaying cosurety, is admissible in an action to enforce contribution from the latter.

Clayberg, Corbett & Gunn, W. G. Downing, and W. M. Cockrill, for the appellant.

I. P. Veazey, for the respondents.

²⁴ **BRANTLY, C. J.** This is an appeal from an order made and entered in the district court of the eighth judicial district

in ³⁵ and for Cascade county on January 30, 1897, directing execution to issue in favor of C. M. Webster, H. O. Chowen, and Ernest Crutcher against their codefendant and cosurety, F. P. Atkinson.

On December 22, 1892, the plaintiff herein recovered judgment against the Great Falls Opera House Company, a corporation, as principal, and C. M. Webster, Charles Wegner, H. O. Chowen, F. P. Atkinson, Ira Myers, and Ernest Crutcher, as sureties, for the sum of two thousand two hundred and forty-two dollars and fifty cents, with interest at ten per cent per annum from the date thereof. The motion for execution herein against F. P. Atkinson was made upon the same day as the motion made in the case of *Northwestern Nat. Bank v. Great Falls Opera House Co.*, 23 Mont. 2. It was heard at the same time and upon substantially the same proof. The right to contribution from Atkinson in this case, however, is based upon a formal assignment of the judgment by the plaintiff to the moving defendants after payment of the same by them. This payment was made on December 23, 1892, and the facts with reference to it are set forth in full in the opinion in *Northwestern Nat. Bank v. Great Falls Opera House Co.*, 23 Mont. 2. The affidavit of the moving defendants herein differs from the affidavit made in that case, in that it predicates the claim of contribution upon the assignment of the judgment. It also appears from the affidavit that, though assigned to the respondents, the judgment was thereafter formally satisfied by the attorneys for plaintiff at the request of some one of the respondents, in order that it might not appear as a lien upon the real estate of the respondents, which they were selling from time to time. This formal satisfaction is alleged to have been made for this purpose only.

The defenses alleged in the counter-affidavit of Atkinson in this case are the same as in the former case. The action of the court upon the defense based upon the alleged contract of Atkinson with Webster, Chowen, Crutcher, and Myers, and also upon the plea of the statute of limitations, was the same. The contract sought to be made available herein is the same ³⁶ as the one alleged in that case, Atkinson claiming that the agreement of release in consideration of the loan of three thousand two hundred dollars by the Cascade Bank on February 14, 1893, applied to both judgments.

After the proof was heard the court below ordered execution to issue against Atkinson for four hundred and forty-eight dol-

lars and fifty cents, or one-fifth of the judgment, with interest; it appearing that Ira Myers had contributed his share of the judgment and that Wegner was insolvent. From this order Atkinson appeals.

Besides the assignments of error made in the former case, which were therein considered and disposed of and will not be here again examined, the appellant ask a reversal on two grounds: 1. That the court erred in granting the motion, for the reason that no notice of payment and claim of contribution was filed as provided by section 1242 of the Code of Civil Procedure; and 2. That the court erred in granting the motion for the reason that the judgment had been satisfied of record.

1. The contention is here made that the respondents, having failed to give the notice required in order to avail themselves of the provisions of section 1242, cannot have the relief sought under the assigned judgment; and this is equivalent to saying that, because the legislature has provided a summary mode by which a surety may enforce reimbursement or contribution under the judgment, the respondents may not, therefore, resort to the remedy invoked here. We understand, however, that the remedy provided by this section is cumulative, and that all the rights and equities existing in favor of the sureties in this regard will be enforced by the courts in proper cases, notwithstanding the existence of the statute providing the summary mode. The surety may proceed to obtain relief by any recognized mode: *McDaniel v. Lee*, 37 Mo. 206; *Peters v. McWilliams*, 36 Ohio St. 155; *German-American Bank v. Fritz*, 68 Wis. 390. In the case of *Peters v. McWilliams*, 36 Ohio St. 155, in commenting upon a similar statute, the court say: "The effect of ³⁷ this statute upon the case at bar is to give the plaintiff, who had an existing demand on defendant, a cumulative remedy." It clearly appears in this case that the respondents at the time of payment took an assignment of the judgment, intending to keep it alive in order to enforce contribution from their cosureties. The question presented by this contention therefore is, May a surety who has paid a judgment against himself and his cosureties take an assignment of it to himself and avail himself of it to enforce contribution from his nonpaying cosureties? The right of a surety who has paid the judgment against himself and his principal to keep it alive by having an assignment made to a stranger for his benefit is well settled: *Freeman on Judgments*, sec. 470; *Black on Judgments*, sec. 996. He may also, as against his principal, be subrogated to all the rights of

the creditor under the judgment, where such is the intention at the time payment is made: *German-American Bank v. Fritz*, 68 Wis. 390; *Eddy v. Traver*, 6 Paige, 521, 31 Am. Dec. 261; *Goodyear v. Watson*, 14 Barb. 486; *Fleming v. Beaver*, 2 Rawle, 128, 19 Am. Dec. 629; *Freeman on Judgments*, sec. 475. And this may be done whether an assignment be made for the benefit of the surety or not: *Scribner v. Hickock*, 4 Johns. Ch. 530; *Fleming v. Beaver*, 2 Rawle, 128, notes. The court will, in such case, make the substitution, and grant such relief as may be proper. It is held, also, that a voluntary payment of the judgment by one of several defendants primarily liable thereunder inures to the benefit of all, and extinguishes the judgment: *Freeman on Judgments*, sec. 472. "Whether one of the several persons against whom a joint judgment has been recovered may pay the judgment, and still keep it on foot by any means or for any purpose, is a question upon which the authorities are very equally divided": *Freeman on Judgments*, sec. 472. It is held in New York that this cannot be done: *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Booth v. Farmers' etc. Nat. Bank*, 74 N. Y. 228. This rule is recognized in Massachusetts, Vermont, North Carolina, Indiana, and Alabama: *Hammatt v. Wyman*, 9 Mass. 138; *Porter v. Gile*, 44 Vt. 520; *Sherwood* ²⁸ v. *Collier*, 14 N. C. 380, 24 Am. Dec. 264; *Preslar v. Stallworth*, 37 Ala. 402; *Klippel v. Shields*, 90 Ind. 81. But there is an intimation in these cases cited from New York, Indiana, and North Carolina that this is not the rule where there are special circumstances in the case, and the judgment be assigned for the benefit of the paying defendant, or where he occupies the position of a surety, and not that of one who is primarily liable. In *Klippel v. Shields*, 90 Ind. 81, the court say: "There are cases where a different rule applies; as where the person who pays the debt occupies the position of surety, or some similar relation."

On the other hand, it is held by eminent authority that a surety who pays the judgment for his principal and cosureties may not only keep the judgment alive as to his principal to enforce reimbursement, but also against his cosureties for the purposes of contribution; and this may be done either by assignment to a third party for the benefit of the surety paying, or by direct assignment to the surety himself: *Coffee v. Tevis*, 17 Cal. 239; *Wheeler's Estate*, 1 Md. Ch. 80; *Brown v. White*, 29 N. J. L. 514, 80 Am. Dec. 226; *Scribner v. Hickock*, 4 Johns. Ch. 530; *Lidderdale v. Robinson*, 12 Wheat. 595; 1 *Brandt on Suretyship*, 2d ed., sec. 279. The right to subrogation in such cases

is made to depend upon the intention of the debtor at the time the payment is made. In *Campbell v. Pope*, 96 Mo. 468, a judgment had been rendered against several joint defendants, including the city of St. Louis. The judgment was for a tort. Under a clause in its charter the city of St. Louis was only secondarily liable. This judgment was assigned by the plaintiff to a third party, to be kept alive for the benefit of the city, which paid it for the purpose of enforcing contribution. The court supports the right to do this, and, after citing with approval the doctrine of the cases *supra*, say: "We must hold, and do hold, that the payment made by Campbell for the assignment of the judgment was not intended to be a satisfaction of the judgment, and that the assignment thereof to him was made for the purpose of keeping the judgment alive, so that it ^{so} might be enforced against the codefendants, who, under the judgment and charter provision above quoted, were primarily liable for its payment."

We are unable to draw any substantial distinction between the rights of a surety against his principal and his rights as against his cosurety. In each case they are founded upon the implied agreement, growing out of the relation the parties bear to each other, that the one will refund or make good to the other money paid out by the former for the benefit of the latter. If the assignment can be made to a third party, and he can proceed as the agent of the paying defendant to enforce contribution against the codefendants, there is no sound reason why the same thing cannot be done by an assignment directly to the paying defendant himself, and contribution enforced in his name. To say that one can do through an agent what he cannot do himself seems absurd. In the case of *Coffee v. Tevis*, 17 Cal. 239, the court brushes aside this fiction, and treats the judgment assigned to the agent as if it had been made directly to the paying defendant. We are of the opinion, not only that the assignment may be made for the benefit of the cosurety, but that it may be made directly to the person who is to benefit by it, and that he may enforce it in his own name. This conclusion seems to be in conformity with the spirit of our statute that the real party in interest shall prosecute the action in his own name: *Comp. Stata. 1887, div. 1, sec. 4; Code Civ. Proc. 1895, sec. 570.*

2. It appears from the record, without dispute, that the judgment in this case was formally satisfied by an entry on the judgment record some time after the assignment was made.

The respondents were engaged in dealing in real estate, and this satisfaction was entered in order that the lien of the judgment might not appear as a cloud upon their title. The judgment standing open as to them, they were put to the inconvenience of securing releases or giving bond to clear the title. Crutcher, after taking advice, procured the satisfaction to be entered by counsel for the bank. It was intended ⁴⁰ to have it entered as to respondents only. Atkinson had no connection with the matter nor did he pay any consideration for it. The contention is made that this entry of satisfaction precludes the respondents from obtaining any relief. This contention would be well founded if the satisfaction had been entered generally by plaintiff before the assignment, or, at the request of the defendants, after the assignment, for the purpose of discharging the judgment: Freeman on Judgments, sec. 466. But such was not the case here. The judgment was assigned by the plaintiff to the respondents, to be kept alive by them for the purpose of enforcing contribution, and no entry of satisfaction thereof would inure to the benefit of the nonpaying surety unless the intention was thereby to discharge him. It was the intention here that the satisfaction of the judgment should be effective only as to the respondents, and not as to the other defendants. It was not entered in pursuance of any agreement between appellant and respondents. Therefore, as to him, the judgment remained unsatisfied, and, if in force at all against him, it was in force for all purposes. A formal satisfaction of a debt without payment, where it is intended that discharge shall take effect upon such payment, does not prevent the payee from enforcing the collection of his claim. There is no reason why the same rule should not apply to a judgment. In reaching the conclusions we announce in this case, we are not unmindful of the old distinctions between actions at law and in equity. Under the provisions of our statute (Comp. Stats. 1887, div. 1, sec. 1; Const., art. 8, sec. 28; Code Civ. Proc. 1895, sec. 460) these distinctions as to form have been abolished, and the court, having jurisdiction of the parties, can afford such relief as the facts of the case may justify: *Faurot v. Gates*, 86 Wis. 569. An examination of the authorities cited in the former part of this opinion will show that courts of equity readily granted such relief as is sought herein, and we see no reason why it should be denied here and the respondents driven to a separate action.

3. A further assignment is made by counsel for appellant ⁴¹ in their argument, though it is not in their brief, that the court

below erred in permitting respondent Crutcher to state in his testimony that it was not his intention, at the time he procured satisfaction of the judgment to be entered, to satisfy it as to appellant. This evidence was clearly competent, and the trial court committed no error in admitting it.

Let the order appealed from be affirmed.

Mr. Justice Pigott, having been of counsel, took no part in this decision.

SURETYSHIP—CONTRIBUTION.—A surety who pays the debt of his principal is entitled to be subrogated to the rights of the creditor as against his principal and cosurety, and to have a judgment against the principal which he has paid assigned to a trustee for his benefit, in order to compel his cosurety to contribute his pro rata liability: *Peebles v. Gray*, 115 N. C. 38, 44 Am. St. Rep. 429. See, too, *Sherwood v. Collier*, 14 N. C. 380, 24 Am. Dec. 264. On the right in general of a cosurety to enforce contribution, see the monographic note to *Gross v. Davis*, 10 Am. St. Rep. 639-647.

BUTTE & BOSTON MINING COMPANY v. SOCIETE ANONYME DES MINES DE LEXINGTON.

[23 MONTANA, 177.]

MINES AND MINING—RIGHT TO PURSUE VEIN.—The right of an apex proprietor to pursue an ore vein passing on its dip from his side lines is dependent upon whether or not, as a fact, the part or mineral body of vein matter which lies outside of the perpendicular of the side lines of his surface claim is so preserved in its identity with the lode inside that it is part of the same vein the apex of which is within his side lines.

MINES AND MINING—RIGHT TO PURSUE VEIN.—A miner who has the apex in his location is entitled to the ore vein, and he has as much length thereof on the strike, no matter how deep he may go in the dip, as he has length of apex within his surface lines, whether such apex reaches the surface or is found beneath, within the planes of his exterior boundary lines extending downward perpendicularly.

MINES AND MINING—IDENTITY OF VEIN.—Identity is necessary to enable the owner of a mining claim to establish his right to mineral outside the perpendicular of the side lines of his surface claim as a part of the vein, the apex of which is within such side lines, and the vein must be continuous in a sense, but its continuity may be interrupted even to a closure of the fissure, without destroying the identity, provided the extent of the interruption or closure does not prevent the tracing of the lode or vein through the fissure to be identical in its parts as a geological fact.

MINES AND MINING—CONTINUITY OF VEIN.—By "continuity" of a mineral vein is meant such mineral or geological connection as would enable a person to follow the vein along its dip,

and through the obstructions, interruptions, and breaks which may occur therein, with reasonable certainty that it is the same and identical vein throughout its depth, from the apex to the point of controversy. Such continuity is all that is required to enable the locator to identify and follow the vein as his.

MINES AND MINING—IDENTITY OF VEIN.—If mineral veins are permanently separated and cannot be followed as the same vein, and, in order to connect them, it is necessary to pass through a considerable distance of rock showing no elements of a vein, where there are neither minerals, walls, or seams, they must be deemed separate and distinct veins, and cannot be identified as one and the same vein.

TRIAL—INSTRUCTIONS—DEFINITIONS.—In defining matters calling for definition, the court may put before the jury the prerequisites necessary to be proven before a certain condition can exist, provided it is left to the jury to decide the question of fact involved in each prerequisite, and provided it is not told that it must deduce any certain conclusion from the facts if found to be true.

TRIAL — INSTRUCTIONS — IDENTITY OF MINERAL VEIN.—An instruction concerning the identity of mineral veins, stating that if no evidence of a vein appear for any considerable distance the veins are not identical, the use of the word "considerable" is not objectionable as being indefinite or confusing.

APPEAL.—THE OPINION OF THE TRIAL COURT IN granting a motion for a new trial is no part of the record, and cannot be resorted to for the purpose of adding to the record sought to be reviewed.

NEW TRIAL—INSUFFICIENT EVIDENCE.—The trial court is justified in granting a motion for a new trial, after verdict, when he believes that the evidence is insufficient to support the verdict, and such evidence is conflicting.

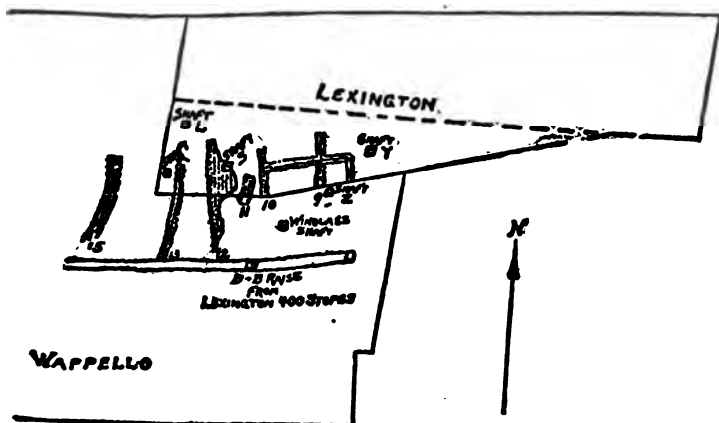
J. F. Forbes and L. Marshall, for the appellant.

W. W. Dixon and J. W. Cotter, for the respondent.

¹²⁰ **HUNT, J.** Action to recover the value of ore taken from a vein beneath the surface of that portion of the Wappello lode claim owned by plaintiff (appellant). The Butte & Boston Mining Company, plaintiff and appellant, owns the south and west portions of the Wappello lode claim, while the Societe Anonyme des Mines de Lexington, respondent here, owns the northeast portion, as indicated by the diagram accompanying this opinion. A. J. Davis formerly owned the Wappello, and both plaintiff and defendant derive title from him; the conveyance to defendant of its portion having been prior to the conveyance of plaintiff's portion to it. Defendant entered beneath plaintiff's premises and extracted ores; hence the principal question involved was whether the vein from which the defendant took the ores had its apex within the surface boundaries of that portion of the Wappello lode claim owned by the defendant, or had its apex within the surface boundaries of that portion of

the Wappello owned by the plaintiff. Incidental ¹⁸⁷ to the determination of this issue was the question of the amount of damages.

The case was tried to a jury. The evidence was conflicting, many experts for plaintiff claiming that the apex of the vein from which the ores were extracted was in plaintiff's ground, and that it was wholly disconnected with any vein in defendant's ground, while an equal number of expert witnesses called by the defendant testified that, in their opinion, the apex of the



vein was in the defendant's ground. Elaborate instructions were given to the jury, who found for the plaintiff for one hundred and twenty-five thousand dollars damages. The defendant moved for a new trial, based upon errors in the instructions the court had given to the jury, and insufficiency of the evidence to justify the verdict and findings of the jury. The court granted the motion for a new trial, and from the order granting such motion the plaintiff appeals to this court.

To illustrate the theory of the district judge, we give verbatim those portions of his charge which, upon review by motion for a new trial, he held to be incorrect statements of the law:

Instruction 9.

"You will understand, however, that a fragment or portion ¹⁸⁸ of a vein, although it may be sufficiently identified or recognized, will not in itself give its owner the right to enter upon the ground of another and extract ore from other portions of the same vein; for if the two portions of the vein, although once together and forming the same vein, have become separated and

as so separated have formed distinct veins, and the original connection has been so broken or obliterated that such connection cannot any longer be followed, then the owner of the portion having the apex cannot enter through such disconnected portions into the land of another."

Instruction 10.

"Plaintiff and defendant both derive title to the respective portions of the Wappello claim owned by them from the same source.

"It is conceded that the ore, to recover pay for which this suit is brought, was mined and extracted by defendant from beneath the surface of that portion of the said Wappello lode claim owned by the plaintiff.

"Defendant contends that the apexes of two veins lie in that portion of said Wappello lode claim owned by it, and that it has followed the north one of the said veins on its southerly dip into and under that portion of the said Wappello lode claim owned by the plaintiff, and extracted and stoped said ore from said vein, the top or apex of which is in defendant's ground.

"The plaintiff contends that defendant did not and cannot follow said vein continuously from defendant's said ground into and beneath the surface of plaintiff's ground, and to where the said ore was stoped out, and that said ore was taken by the defendant from a vein, the top or apex of which lies within plaintiff's ground.

"Now, to properly understand the respective rights of plaintiff and defendant, it is necessary to define what a vein or lode is. And as to that it is enough to say that a vein or lode is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain. In this definition the elements are the body of mineral or mineral-bearing ¹⁸⁰ rock and the boundaries. With either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, as far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if in such fissure ore is found, although at considerable intervals and in small quantities, it is called a 'lode' or 'vein.'

"To maintain the issue on its part, the defendant must prove that a lode, as here defined, extends from that portion of the Wappello ground owned by it into and under that portion of the said Wappello ground owned by plaintiff.

"Reverting to the above definition, if there is a continuous body of mineral or mineral-bearing rock extending from defendant's ground into and under the ground of plaintiff, it must be that there are boundaries to such body, and that the lode exists, or if there is a continuous cavity or opening between similar or dissimilar rocks, in which ore in some quantity and value is found, the lode exists.

"These propositions are correlative, and not very different in meaning, except that the first gives prominence to the mineral body, and the second to the boundaries. Proof of either proposition goes far to establish a lode, and it may be said that, without proof of one of them, a lode cannot exist.

"The proposition of the defendant is that the evidence before you shows that such a lode extends from the ground of the defendant into and beneath the ground of the plaintiff, to the point where said ore was stoped out. The plaintiff denies that proposition, and contends that no such vein as is above described, or any vein at all, has been or can be traced from the point at which said ore was stoped out to any point within the ground of the defendant.

"A continuous body of mineral or mineral-bearing rock, ¹⁹⁰ extending through loose and disjointed rock, is a lode, as fully and certainly as that which is found in more regular formation; but if it is not continuous, or is not found in a crevice or opening which is itself continuous, it cannot be called by that name. In that case it lacks the individuality and extension which is an essential quality of a lode or vein.

"And if no such vein as I have herein described can be traced in its downward course and on its dip from an apex of a vein within defendant's ground into and beneath the surface of the ground owned by plaintiff, and to the point where said ore was stoped out, then defendant had no right to enter into or beneath the surface of plaintiff's ground; and, if it did so, it was a trespasser, and your verdict should be for the plaintiff."

Instruction 11.

"It will be observed from the foregoing instructions that the elements constituting a vein consist of boundaries and the mineral within the vein. Where both boundaries and mineral are wanting, there can be no vein; and, in determining the question,

of continuity, you may apply the same principle. If it becomes necessary, in order to connect two separate and distinct portions of a vein, to pass for any considerable distance through country rock, having none of the elements of a vein, and through which intervening space there are neither minerals or walls or seams to be followed, then it may be concluded that the veins are permanently separated, and one cannot be followed from the other through the intervening space into the ground of another."

Instruction 13.

"The fact that veins unite at one point only, if the same remain separated at other portions of the vein, will not give to one owner the right to enter upon the vein of another, where such veins remain separate or apart. If, therefore, you find from the evidence that the vein belonging to the plaintiff united with the vein of the defendant at one point only, and separates therefrom without uniting at other places, ¹⁹¹ then the most that defendant can claim is the ore extracted from that part of the vein where so united, and on the dip of such union. As to all other portions of the vein not so united, unless the defendant is shown to be the owner of the apexes thereof, you must find for the plaintiff."

Instruction 19.

"The west end line of the tract of ground conveyed to defendant by deeds in evidence is not parallel with the west end line of the Wappello lode claim. Under such state of facts, the defendant will be confined in following any vein on its dip which has its apex in its ground, to a plane drawn downward vertically through the end line as described in the deed executed to it, and extended in its own direction, and not to a plane drawn downward vertically parallel to the original end line of the Wappello claim, at a point where the vein departs on its strike from the ground owned by defendant.

"Unless, therefore, you find the same barred by the statute of limitations, as hereinafter instructed, you must find a verdict for the plaintiff for the value of all ores extracted, if any, by defendant west of the west end line of defendant's ground, extended downward vertically and in its own direction to the point where such ore was extracted."

The foregoing instructions are said by defendant to be erroneous, because the court established continuity as the sole and exclusive test of the right to pursue the vein on its dip within the surface boundaries of appellant's ground, while the question

of identity, urged to be of infinitely more importance, was ignored.

The learned judge of the district court who tried the case granted the motion for a new trial upon the ground, among others, that under the federal statutes (U. S. Rev. Stats., sec. 2322) granting ownership of veins, and giving to locators or owners of a quartz lode mining claim the exclusive right of possession and enjoyment of all the surface included within the lines of the location, and of all veins, lodes, or ledges throughout their entire depth, the top or apex of which ¹⁹² lies inside of said surface lines extended downward vertically, although said veins or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface location, the substantial fact to be proven by the lode claimant who seeks to pass beyond his side lines so projected is that the vein he is pursuing is the identical vein which has its apex within his surface boundaries, and that, if it be the identical vein, the fact that its continuity has been broken is not determinative of the lack of identity, which is the test of right in such cases. To this proposition relied upon by the defendant we shall assent, with some qualifying explanations, none of which, however, are at real variance with the charge of the judge, or conflict with the opinions of the supreme court of the United States, as we interpret them.

The right of an apex proprietor to pursue a vein passing from his side lines is dependent upon whether or not, as a fact, the part or mineral body of vein matter which lies outside of the perpendicular of the side lines of his surface claim is so preserved in its identity with the lode inside that it is part of the same vein, the apex of which belongs to the surface owner. The solution of this question, not infrequently arising in problems of mining litigation, is often very troublesome; and it is in formulating a charge to a jury upon the elements involved in the inquiry that judges enter upon what, some fifteen years ago, Justice Miller characterized as a "delicate task" and "a matter of extreme difficulty": *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529. Judges, under our system, can only prescribe rules of guidance with relation to general principles; they cannot exactly apply these rules, though it is in their application that half the "extreme difficulty" arises, for the jury has its duty to be performed, and it cannot be interfered with. It is often hard, by looking at a map or model of conflicting mining locations and veins, to state principles which should control the sev-

eral hypotheses presented in a case; but it is sometimes much harder to correctly ascertain the true facts, ¹⁹³ from the testimony addressed to the model, to which the legal principles should be applied. And it will ever be difficult to get at the facts of such cases until geologists agree upon like deductions from the complex, if not uncertain, conditions of the earth in which mineral deposits are found.

On principle, the identity of the apex of a vein with its spurs or extensions must be the crucial test by which are to be fixed the proprietary rights to that vein and the mineral therein. The full benefit of his discovery is what section 2322, *supra*, preserves to the miner; and to meet the geologic conditions which exist in the tendency of veins to depart from a perpendicular as they go downward, that the object of the statute might be carried out, section 2322 of the Revised Statutes of the United States authorizes a miner to follow the vein on its dip to an indefinite length, wherever it goes, provided, of course, he has the apex, and provided, further, he does not cross the vertical planes of the end lines. "The intent of the statute," said Justice De Witt, in *Fitzgerald v. Clark*, 17 Mont. 100, 52 Am. St. Rep. 665, "is to give the miner a section or block of the vein of a length on the strike which is equal to the length of the apex lying within the exterior vertical bounding planes of the location, and of a depth as far as he desires or is able to work downward, and, at the most remote depth attained, he shall have the same number of feet on the strike as he had at the apex: *Iron Silver Min. Co. v. Elgin Min. etc. Co.*, 118 U. S. 205. We have always been of opinion that this is the keynote of the interpretation of section 2322 of the Revised Statutes of the United States; that is to say, if the miner has the apex in his location, he is to have the vein, and he has as much length of the vein on the strike, no matter how deep he may go in the dip, as he has length of apex within his surface lines, whether that apex reaches the surface or is found beneath the same, within the planes of his exterior boundary lines extending downward perpendicularly. This, in our opinion, is what section 2322 says in plain language."

The pursuit of the vein on its dip being, then, the right to ¹⁹⁴ be guarded, the identity of the vein pursued must be proven, to make the right availing, where it is contended the vein, after passing beyond the vertical planes drawn through the side lines of the surface boundaries of the location in which rests the apex, penetrates soil the surface of which is embraced within an-

other location. Identity must always exist. Were there any departure from this rule, the miner might secure the benefit of more than he discovered, which was never contemplated by the law. Identity in mineral deposit should have no significance not usual to identity of many other material things. It means the same thing, or the same vein. It may be said to include a vein that is incessant. But a vein that is incessant or identical in its parts is not necessarily a vein which is continuous, in the sense that the continuity or union of its parts is absolute and uninterrupted; in other words, though a continuity of vein does not preclude identity of vein, yet identity does not necessarily include continuity, in the exact sense just referred to. "Law of continuity [Mathematics and Physics]," says Webster's Dictionary, "the principle that nothing passes from one state to another without passing through all the intermediate states." Speaking exactly by this definition, it would often be very difficult, if not impossible, for the challenged proprietor of a mineral vein to convince a jury of the continuity of the vein from one part to another, for there might not be continuity by actual contact of the parts or contiguity, which the precise word may literally mean must exist. Were such a rule inexorable, a failure of proof would not infrequently be brought about by the inability of the miner to prove continuity without transition through intermediate states. The miner, therefore, might fall short of that exact measure of evidence required to establish a continuity of vein which excludes any interruption between one and another part of the identical vein, and, judged by too closely interpreted significations, the continuity of the vein would be lost; yet if he prove the identity of his vein by some incessant feature, in our judgment, the right to pursue the lode on its dip is his, and there ¹⁰⁵ should but remain the necessity of going to the surface limits to accurately adjudicate the lines defining the right to the vein so identified. Take, for an example of a lack of continuity, but of practical identity, a true fissure vein, lying in a section of country consisting of sedimentary and eruptive rock. The miner may encounter what he terms a "fault fissure"—a rupture in the rocks, accompanied by a relative movement of the walls. During the readjustment of the country on either side of the fissure, masses of these walls are torn off, and, falling into the fissure, become vein filling, termed by geologists "conglomerate," "breccia," and "horse matter," as the fragments or masses of unbroken country rock found between the walls may indicate. It can be readily seen

that if the fissure is found in a slate country, with intrusions of granite, the filling may consist of slate or granite, or both, while there may even be slate on one wall and granite on the other, or similar or dissimilar formations or fillings on either or the two. The mineralization of the vein—the deposition of the precious metal—occurs subsequent to the rupture only in such places between the walls as form channels or are pervious to mineral solution. Now, the miner's object is to disclose and mine the mineralized portion of the vein, and to do so economically. But he will not necessarily continue his exploitation from an initial point. He may work at numerous points on the vein, or he may drive a tunnel through extraneous rock to tap the vein at a point quite remote from his other workings. If he finds pay ore in one part of his claim, and he finds it occurring in mineralized quartz accompanying slate breccia, and in another part he finds barren granite conglomerate, he is at once confronted with a serious difficulty—of proving the chances of a continuity by contiguity of deposit; but if he has developed his claim so as to prove the existence of a fissure with a certain relative movement between its walls, and he finds ore accompanied by slate breccia in the one part and broken granite in another, if in this last-considered portion he determines that his new find practically corresponds in dip and strike with the known portions of the ^{1st} fissure, and if the newly developed walls show certain evidences, by way, perhaps, of striations or corrugation, or otherwise corresponding in dip to those determined in other portions, and the position of the newly developed deposit occurs approximately in the plane of the fissure, he has practically identified his vein at this point, and is justified in assuming that he can follow the walls just developed, incessantly, until he connects them with the walls determined in other portions of his mine, and he may claim the lawful right to do so under the statutes of the United States.

In this discussion, however, we do not mean to exclude the need of a continuity sufficient to preserve identity. The application of the rule of identity of vein should always be made so as to require the miner to trace his lode continuously, if he depart beyond his extended side lines. There must always be in any lode that "zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock": *Eureka Consol. Min. Co. v. Richmond Min. Co.*, 4 Saw. 302; *Fed. Cas. No. 4,548*. Nevertheless, there may be an identical vein, although ore is found at considerable intervals and in

small quantities, if the boundaries constituting the fissure are well defined. It is hard to frame any statement that will express the correct rule with the directness that marked the language of Judge Hallett in *Iron Silver Min. Co. v. Cheesman*, approved by the supreme court of the United States in 116 U. S. 529. He said: "The proposition of the plaintiff is that the evidence before you shows that a lode exists in the ground in controversy, as already defined. The defendants deny that proposition, and the case turns on that question. They concede that there is in the territory opened by the works ore in detached masses or fragments, but so intermingled with the inclosing rock that it cannot be regarded as a continuous body or as marking the line of a lode or vein. All that has been said by witnesses about rock in place is valuable only as it tends to prove or disprove the existence of a crevice or opening extending from one claim to the other. Excluding the wash, slide, or debris ¹⁰⁷ on the surface of the mountain, all things in the mass of the mountain are in place. A continuous body of mineral or mineral-bearing rock, extending through loose and disjointed rocks, is a lode as fully and certainly as that which is found in more regular formation; but if it is not continuous, or is not found in a crevice or opening which is itself continuous, it cannot be called by that name. In that case it lacks the individuality and extension which is an essential quality of a lode or vein. Recognizing this, the plaintiff has given evidence to establish the existence of porphyry and lime in regular order, with an opening between them filled with vein matter."

It becomes, then, a question of fact, to be decided by the jury subject to general rules, whether there is that essential identity and continuity by which the vein can be traced through the surrounding rocks. The supreme court of the United States, in *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, said: "Certainly, the lode or vein must be continuous, in the sense that it can be traced through the surrounding rocks, though slight interruptions of the mineral-bearing rock would not be alone sufficient to destroy the identity of the vein. Nor would a short, partial closure of the fissure have that effect, if a little further on it recurred again with mineral-bearing rock within it. And such is the idea conveyed in the previous part of the charge. 'On the other hand,' said the judge, 'with well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if in such fissure ore is found, although at consid-

erable intervals and in small quantities, it is called a lode or vein.' ”

The true sense in which there must be a continuity of vein is therefore a qualified one, and not an unqualified, exact one, irrespective or independent of physical conditions found in mining. It may be said, as a paraphrase of the decision cited, that identity is essential, and the vein must be continuous, but its continuity may be interrupted, even to a closure of the fissure, without destruction of the identity, provided the extent ¹²⁸ of the interruptions or closure does not prevent the tracing of the lode or vein through the fissure to be identical in its parts as a geological fact: Lindley on Mines, 770, 1123; Cheesman v. Shreeve, 40 Fed. Rep. 787.

Going directly now to instructions 9 and 10 quoted, we find that they did not establish the proposition that continuity was the sole test of the right to pursue the vein extralaterally, to the exclusion of identity. True, they emphasized the necessity for continuity, but that was but one phase of the right of pursuit upon which stress was laid. But that it was not established to the exclusion of the question of identity is quite apparent by examining instruction No. 8, just preceding No. 9, wherein the court asserted the following rule of law: “Before the defendant would be entitled to follow a vein having its apex within the defendant’s ground beyond the boundary lines and into the ground owned by the plaintiff, it must be shown by the evidence that the vein so followed is continuous from defendant’s ground into that of the plaintiff. By ‘continuity’ is meant such mineral or geological connection as would enable one to follow the vein along its dip, and through the obstructions, interruptions, and breaks which may occur therein, with reasonable certainty that it is the same and identical vein throughout its depth from the apex to the point or points of controversy.”

By this definition of “continuity” the jury were confined within limits which required the continuity of vein to be one where the mineral or geological connection was such that, though it might be interrupted, still it must be sufficient to enable the miner to follow the dip with reasonable certainty that the vein, though obstructed or interrupted, is the same and identical vein throughout its depth from the top to the point in controversy. This definition of a “continuous vein” was not excepted to; nor is it adverted to by the defendant’s counsel in his brief; but it seems to us to have been a most important instruction—one upon which the jury were authorized to proceed, holding al-

ways, however, to the need not only of a continuous vein in the sense approved of by the ¹⁹⁹ supreme court of the United States and by ourselves herein, but that it must be so continuous as to demonstrate that it is the identical vein from the apex down. Thus, the court appears to have based its instructions upon a premise of the requirement of identity; and mere omission to not direct the jury more fully upon every phase of the case presenting the relation of identity was not error, appropriate complementary instructions not having been requested and refused: Thompson on Trials, secs. 2328, 2346.

The respondent particularly objects to that portion of instruction 11 where the court said that "if it becomes necessary, in order to connect two separate and distinct portions of a vein, to pass for any considerable distance through country rock, having none of the elements of a vein, and through which intervening space there are neither minerals or walls or seams to be followed, then it may be concluded that the veins are permanently separated, and one cannot be followed from the other through the intervening space into the ground of another." It is argued that by this sentence the court, while admitting that the two detached portions were parts of the same vein, "virtually told the jury that they could not be followed on the dip." The right of a jury to draw its own conclusions of fact from the evidence before them is elementary under the practice of this state. Hence we agree that the court must avoid language which "virtually" decides facts, and withdraws their determination from the consideration of the jury; but we cannot think there was fatal error in telling them they might conclude that the veins were permanently separated where every one of the conditions enumerated in the hypothesis was found to exist as a proven fact, for the combination fairly excluded all reasonable chance for a continuance and identity of vein. The instruction ought to have been slightly modified, so as to avoid any possible danger of implying an opinion of the judge that there was no need of identity, and it would be well to revise it on another trial; but we are not satisfied that it was objectionable to the extent of having been prejudicial. In defining matters calling ²⁰⁰ for definition, a court may certainly put before a jury the prerequisites necessary to be proven before a certain condition can exist, provided it is left to the jury to decide the question of fact involved in each prerequisite, and provided they are not told that they must deduce any certain conclusion from the facts if found to be true.

It is also contended that the word "considerable" was meaningless as used, and was only calculated to confuse the jury. To support this reasoning the case of *Stevens v. Williams*, 1 Morr. Min. Rep. 566, Fed. Cas. No. 13,413, is referred to. In that case, under the evidence, which was treated as uncontradicted, the judge refused to use a similar term because it conveyed no accurate conception of the extent to which a vein might be interrupted, yet not cease to be a lode or vein upon which a miner had a right to pursue it into the adjoining land. Doubtless, under the facts of the case, considering the practice which obtains in the federal courts, where judges have a right to comment upon matters in evidence, that truly great judge (Miller), who refused to so charge, was correct in regarding the term "considerable" as too indefinite and as unwarranted by the evidence; but that he did not afterward look upon it as generally too vague a term, when used in a charge substantially like that under consideration in the case at bar, is made plain by his express approval of its use by Judge Hallett in *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, heretofore referred to, where, as the organ of the supreme court, he quoted Judge Hallett's statement that what is called a "vein" or "lode" exists where boundaries, as defined in the opinion, are found, constituting a fissure, and where in such fissure ore is found, "although at considerable intervals and in small quantities." As part of an oft-given definition, therefore, it was not unfitting—surely not inaccurate—when considered with the previous instructions, which, as far as they went, set before the jury the law, and qualified the definition by explaining what continuity of vein gives the miner a right to pursue it on its dip and extralaterally.

The only objection urged by respondent to instruction 13 is ²⁰¹ that in it the court assumed the existence of a fact in controversy, namely, that plaintiff had a vein which united with defendant's vein. Inasmuch as defendant denied the existence of any vein in plaintiff's ground which united with the vein in dispute, the court, upon retrial, should avoid reference to "the" vein, and thus obviate the criticism applied to the instruction as framed.

Appellant says the court erred in granting a new trial because of error in instruction 19, *supra*. As said before, plaintiff and defendant are owners of different portions of the Wappello mining claim, and derive title from the same source. It will be observed, too, that the west end line of the Wappello,

as located, is not parallel with the west end line of the tract conveyed to defendant. The deed to the plaintiff from A. J. Davis was also subsequent to his deed to defendant's grantors, and was made subject to the conditions and grants of the deed to the defendant's grantors. It will be seen that the instruction under examination confined the defendant in following a vein on its dip to a plane drawn downward vertically through the end line as described in the deed from Davis to defendant's grantors, extended in its own direction, and forbid the right to a plane drawn downward vertically parallel to the original end line of the Wappello, at a point where the vein on its strike leaves the ground owned by the defendant. The judge of the trial court, when he granted a new trial, was of the opinion that under such circumstances defendant's grantors made their grant in view of the mineral character of the land conveyed, and did not except from it any of the mineral rights which theretofore existed in, or attached to, the portion thereby conveyed, and for this reason he regarded the instruction given as manifestly wrong. On this question the court was asked, but refused, to charge as follows: "If the jury believe from the evidence that the ore in controversy in this action, and which was taken by defendant from the Lexington stopes beneath the surface of that portion of the Wappello claim owned by plaintiff, was taken from a vein or veins which have their top or apex north of the dividing line between ²⁰² the Butte & Boston portion of the Wappello and the Lexington portion of the Wappello, and within the surface lines extended downward vertically of said Lexington portion of said Wappello claim, and from between vertical planes drawn downward at the surface, one through the easterly end line of the Wappello claim location and the other through a line parallel to said easterly end line and also to the westerly end line of said location, at a point where such vein or veins having their top or apex within the surface lines extended downward vertically of said Lexington portion of said Wappello claim departs on its course or strike from the west surface end line of said Lexington portion of said Wappello claim, so continued in their own direction that such planes will intersect such exterior parts of such vein or veins, then and in such case said ore was the property of defendant, and it had a right to extract the same, and plaintiff cannot recover damages therefor, and the jury will find for the defendant."

By its refusal to give the charge requested, and by having given instruction 19, there arises the important question of whether, under certain conditions as presented herein, a miner must follow along a plane of the end line of the claim drawn down at the point of departure of the vein from the conveyed premises, or must follow the plane of the end line of the conveyed premises which may cross the vein. We approach the solution of this matter at this time with extreme hesitation, for the reason that the counsel for appellant, at whose request instruction 19 was given, candidly says in his brief that "he never believed the doctrine announced in the instruction [given] to be a correct one," but that, as the question was an open one, it could not only be preserved for review by asking the court to charge as it did in said instruction 19. The court is therefore somewhat embarrassed by being asked to determine a vexed and difficult matter, where counsel for both sides, for whose proficiency and learning upon the law of mining we entertain the highest respect, and the judge who granted a new trial, agree that the court, by instruction 19, incorrectly ²⁰³ stated the law to the jury. It would certainly save some confusion to hold to the rule, upheld by counsel and court, that the end line of a claim should determine the limits on the dip of the vein taken at any point along the vein, so that a purchaser of a portion of a claim would acquire so much of a vein on its dip as he has apex at the surface, the limits on the dip of the vein to be fixed by the course of the true end lines of the claim from which the portion was conveyed; and such a holding would harmonize with the principle of saving to the miner the right to follow the dip wherever it goes, if he has the apex and keeps within prescribed vertical planes. But in a recent decision by Judge De Haven (Boston etc. Min. Co. v. Montana Ore Purchasing Co., 89 Fed. Rep. 529) a contrary rule was laid down, and support for it put in the cases of Richmond Min. Co. v. Eureka Min. Co., 103 U. S. 839, and Stinchfield v. Gillis, 107 Cal. 86. We hardly think the last case went as far as Judge De Haven did, although the opinion states, in part, that "if the proprietor of a tract of mining ground which has been derived through several locations should dispose of the same in parcels irrespective of the lines of such locations, the rights of his grantees would be measured by the terms of their deeds." Nor does the opinion of the supreme court of the United States in Richmond Min. Co. v. Eureka Min. Co., 103 U. S. 839, fully sustain the federal case cited; for the facts

relieved the court of the necessity for considering what, if any, presumptions attach to the grant of a conveyance of a part of a patented mining claim. As a decision upon the point is not necessary, owing to the condition of the record and considering the concurrent views of counsel for both sides, we prefer to reserve the question until it shall come before us in some instance wherein the doctrine of the federal court is submitted to us with the earnest support of counsel as the true and correct rule of law, and not with a conviction of its inaccuracy.

It is urged that, even though instruction 19 was erroneous, it became unimportant, in the light of the finding by the jury ~~204~~ that the vein in question was entirely south of the dividing line between the Wappello and Lexington, and all belonged to the plaintiff; but as the order granting a new trial must be affirmed on other grounds, it would serve no purpose to examine the finding and the evidence bearing upon it to see if the instruction was correct.

Finally, appellant insists that the court ought not to have granted a new trial because, as counsel puts it, "not satisfied with the verdict of the jury." This expression is the deduction of counsel from the opinion delivered by the district judge when he made the order granting the defendant's motion for a new trial, copy of which is in the transcript. The order of the court was as follows: "This day the motion herein for a new trial is by the court sustained, to which ruling plaintiff by counsel duly excepts. . . . The opinion is not part of the record, and cannot be resorted to for the purpose of adding to the order sought to be reviewed": *Menard v. Montana Cent. Ry. Co.*, 22 Mont. 340. This being true, and the court not having made an order explicitly excluding the ground that the evidence was insufficient to justify the verdict, and the record showing a substantial conflict in the evidence, this court must affirm the order as made within the sound discretion of the trial court.

We will add, however, that as counsel for both sides seem to have made their briefs upon the assumption that the old practice of making the opinion of the district judge part of the record still obtains, we have carefully read it and considered it as an aid to the decision herein, and are still of the opinion that the fair inferences to be drawn from the reasoning of the trial judge are that he believed there was an insufficiency of the evidence to justify the verdict, which was one of the grounds specified in the motion for a new trial made by

the defendant. It therefore followed from that belief that the judge was justified in granting the motion (*Patten v. Hyde*, 23 Mont. 23); and it now further follows that the order must be here sustained. It is so ordered.

Affirmed.

MINES AND MINING—CONTINUITY OF VEIN.—In an action to recover the value of ore taken from a portion of a vein lying within the defendant's claim, with its apex in the plaintiff's claim, the defendant claiming that a continuous vein with the apex thereof on his ground connects with the ore bodies, such connection can be made only by following a continuous streak or body of quartz or ore, or by passing through vein matter, and it cannot be made by following such material or indication as a practical miner would follow with the expectation of finding ore: *Fitzgerald v. Clark*, 17 Mont. 100, 52 Am. St. Rep. 665.

MINES AND MINING.—ON EXTRALATERAL RIGHTS, see *Fitzgerald v. Clark*, 17 Mont. 100, 52 Am. St. Rep. 665, and the extended notes to *Catron v. Old*, 58 Am. St. Rep. 266-271; *McClintock v. Bryden*, 63 Am. Dec. 108-110.

APPEAL.—THE OPINION OF THE TRIAL COURT is no part of the record: *Tinges v. Moale*, 25 Md. 480, 90 Am. Dec. 73.

NEW TRIAL.—THE TRIAL COURT has discretion to grant a new trial when it is of the opinion that the verdict is contrary to the weight of evidence: Note to *Cable v. Byrne*, 8 Am. St. Rep. 697. See, too, *Gibson v. Western etc. R. R. Co.*, 164 Pa. St. 142, 44 Am. St. Rep. 586.

YANK v. BORDEAUX.

[23 MONTANA, 209.]

FRAUDULENT CONVEYANCES—CHANGE OF POSSESSION—JOINT OWNERSHIP.—If a joint owner of personalty in possession of another joint owner sells his interest, the purchaser's failure to take possession does not, as against execution creditors of the seller, avoid the sale.

FRAUDULENT CONVEYANCES—CHANGE OF POSSESSION—PRESUMPTION.—The conclusive presumption created by statute, that a transfer of personal property, in the absence of an immediate delivery and actual and continued change of possession of the subject of the transfer, is fraudulent and void as to the creditors of the person making the transfer, is to be indulged only when the person making the transfer has at the time the possession and control of the property. It does not apply to a transfer by one joint owner of his share in property in the exclusive possession of his joint owner.

FRAUDULENT CONVEYANCES—NOTICE OF CHANGE OF POSSESSION—JOINT OWNERSHIP.—If one of several joint owners of personalty sells his interest therein, the purchaser need not notify the other joint owners of the sale in order to make it valid against execution creditors of the seller.

FRAUDULENT CONVEYANCES—CHANGE OF POSSESSION—NOTICE OF.—If a third person purchases the interest in personalty of one of the joint owners thereof while it is in their possession, and it is afterward levied upon under execution against the seller, the failure of the plaintiff to notify the officer making the levy and the seller's creditors of the sale, prior to the levy, does not preclude him from recovering the property.

EXECUTIONS.—ATTACHMENT OR EXECUTION CREDITORS succeed to and acquire only the rights of the debtor, but a purchaser for value and without notice may acquire greater rights and a higher title than his vendor possessed.

MINES AND MINING—MINING LEASE—CONSTRUCTION OF.—If the lessees of a mine agree with the owner to operate the mine in consideration of the owner's furnishing all necessary supplies, and that the net proceeds of the ore after milling shall be equally divided between the parties, in determining such net proceeds only the cost of smelting, and not the cost of mining, hoisting, and handling the ore, should be deducted from the gross proceeds.

MINING LEASE — FORFEITURE — RIGHT TO ORE MINED.—The title of a purchaser of ore from one who obtained it from the lessees of a mine is not affected by a forfeiture of the lease after such ore has been mined, in the absence of an express agreement that such forfeiture carried with it the right to ore previously mined.

Howell & Harney, for the appellant.

J. W. Cotter, for the respondent.

206 **PIGOTT, J.** The plaintiff, claiming to own an undivided one-half interest, amounting to four hundred and thirty-four dollars and thirty-eight cents, in certain ores treated at the Parrot smelter, brought this action for damages against the defendant, who, as constable, had levied upon and seized such interest on executions against the property of Pohndorf, Pearson, **207** and Thompson, in favor of their judgment creditors, and who, upon demand, refused to release the levy or to pay the said amount to the plaintiff. The issues were tried by jury, and a general verdict for the defendant was returned. The plaintiff appeals from an order overruling his motion for a new trial and from the judgment.

For the purposes of the case the facts to be considered in deciding the questions necessarily involved may be summarized as follows: On the eleventh day of March, 1896, one Hughes and seven men associated with him became the lessees for the term of ninety days of the West Elba lode mining claim. On the same day a written contract was entered into between Hughes and his associates as parties of the first part, and Pohndorf, Pearson, and Thompson as parties of the second part, in which the parties of the first part described themselves as

being lessees of the West Elba lode mining claim, and whereby it was agreed, among other things, that the parties of the first part should furnish the labor of eight men each day and operate the mine, and the parties of the second part should provide all supplies and materials necessary to carry on the work; the net proceeds of the ore, after milling or reduction, to be divided equally, the parties of the first part to have one-half and the parties of the second part the other half. From the twelfth day of March to the first day of May, 1896, the parties of the first part were in actual possession of and working the mining claim, and whatever possession the parties of the second part had was merely constructive. On April 29, 1896, the parties of the second part, named in the contract, for a valuable consideration sold and assigned to the plaintiff all their right, title, and interest in and to about twenty tons of silver and gold ore then contained in the ore-house and bins of, and extracted from, the West Elba mine, as well as their right and share in and to the net proceeds of the same as soon as it should have been milled or worked, as their interest appeared by the contract mentioned. After the delivery of the bill of sale to the plaintiff, his agent, in company with Pohndorf, went to the mine, where they found Hughes, who was the ~~now~~ only one of the lessees on the surface. They notified him of the transfer and read the bill of sale to him, requesting him to inform his associates that the transfer had been made, which Hughes promised to do. Hughes, Pohndorf, and the plaintiff's agent then went to the ore-house, and identified and examined the ore in the bins, but the plaintiff did not at any time take actual possession thereof. Even if the parties interested had desired to divide the ore, it was not susceptible of fair division, as it was of unequal grades, some portions of it going several hundred, and some only twenty, dollars to the ton. This ore was afterward delivered by the lessees to the Parrot smelter, and while in the possession of the smelter, and between the first and seventh days of May, the defendant, as constable, levied upon one-half of the net proceeds of the ore as the property of Pohndorf, Pearson, and Thompson, under executions against their property, issued upon judgments rendered in actions brought by three of the lessees to enforce claims in existence when the assignment to plaintiff was made. The proceeds of the ore, after deducting the charges for its treatment, amounted to eight hundred and sixty-eight dollars and seventy-six cents, one-half of which the defendant, by virtue of the

writs in his hands, collected from the Parrot company as belonging to Pohndorf and others. While the net proceeds claimed by the plaintiff were in the possession of the defendant, and before he had applied any thereof toward the satisfaction of the judgments, the plaintiff demanded the release of the money, and requested the defendant to pay it to him, which the defendant refused to do. In the view we take of the case the other evidence need not be stated.

1. Section 4491 of the Civil Code declares that "every transfer of personal property . . . is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession." The theory of the court ²⁰⁹ and of the counsel for the defendant was that this section applied to the facts disclosed by the evidence, and the jury were accordingly instructed that, if the ore had been broken and hoisted out of the mine, and was in the bins at or before the time of the transfer by Pohndorf, Thompson, and Pearson to the plaintiff of their interest in the ore, and the plaintiff did not take and retain the actual and continued possession thereof thereafter, then the sale to the plaintiff was void, and the verdict must be for the defendant. The theory of the court was wrong and the instruction erroneous. The conclusive presumption that a transfer of personal property, in the absence of an immediate delivery and actual and continued change of possession of the subject of the transfer, is fraudulent and void as to the creditors of the person making the transfer, is to be indulged only where the person making the transfer has at the time the possession or control of the property. The presumption does not arise from want of immediate delivery unless the seller or assignor had at the time possession or control of the thing sold or assigned. Pohndorf, Thompson, and Pearson were the owners, in common with Hughes and his associates, of certain ore in bins situate upon the West Elba mining claim. They transferred their title and interest to the plaintiff. At the time of the transfer they were not in possession or control of the ore, but their co-owners were then lawfully in the actual possession and control of the common property, and so remained until it was sent to the smelter for milling and reduction. Under such circumstances, a sale by a tenant in common may not be avoided

by creditors upon the ground that the chattel was not delivered to the purchaser, for, as Mr. Freeman expresses the rule of law in section 167 of his work on Cotenancy and Partition: "If A and B together own personal property, of which A is in actual possession, and B sell his moiety to C, the possession of A immediately becomes the possession of C also. Therefore, being at once, by presumption and construction of law, put in possession as tenant in common with A, it is not necessary that C should take actual possession with A to ²¹⁰ make his purchase good under the statute of frauds as against the creditors of B. If A, the cotenant in possession, had sold his interest, then the sale should have been followed by an actual change of possession, because there was no cotenant whose actual possession could have operated for the benefit of A's vendee." And in section 153 of his treatise on Executions: "The sale by one of several joint owners also furnishes an exception to the rule that there must be a change of possession. If the cotenant selling is in the sole possession, he ought to give possession to his vendee; but if the other cotenants are in possession, the vendor has no right to take it from them. He may, therefore, from necessity, make a valid sale without placing the property in the custody of his vendee." The distinction pointed out is recognized in California, from the statutes of which state section 4491, *supra*, was adopted: *Brown v. O'Neal*, 95 Cal. 262, 29 Am. St. Rep. 111. Additional reason for applying this rule to the case at bar lies in the fact that the several portions of the ore differed so greatly in value as to make a division impracticable without defeating the design of the owners and working injustice to some of them. For practical purposes, the ore was indivisible. In *Brown v. Graham*, 24 Ill. 628, the court say: "Property indivisible in its character, owned by tenants in common, is incapable of a several possession by each tenant. It therefore follows that the possession of one of the defendants is a constructive possession of the others. And when one of the joint owners, not in the actual possession, sells his interest in the property, the purchaser succeeds to all of the rights of his vendor as held by him, without an actual delivery of possession. He, by such a purchase, becomes a tenant in common, and the possession of his cotenant is constructively his possession. It is, however, otherwise when the tenant in common, having the actual possession, makes a sale of his interest, as the possession must in that case, to be valid as against creditors and purchasers, accompany and remain with the title."

Whether or not Hughes informed his mining partners of ²¹¹ the assignment made to the plaintiff is, as matter of law, immaterial. Our attention has not been drawn to any rule of law requiring notice to be given to co-owners in actual possession of the common property of a sale by co-owners whose possession is merely constructive. We do not think that the omission of notice avoids such sale as to creditors of the vendors, and hence we do not decide whether the notice given to Hughes served as a notice to his associates.

2. The jury were instructed that, if the plaintiff had not, prior to the levy, notified the defendant and the attaching creditors of the sale to the plaintiff of a half interest in the ore and its net proceeds, the verdict should be in favor of the defendant. This was prejudicial error. Whatever may be the correct rule as to the necessity, in some cases, of giving notice in order to complete a transfer, or to protect or make secure the title of a vendee or assignee, as against a subsequent good faith purchaser or assignee of the same chattel or interest therein, or of the same chose in action—a subject upon which the courts hold divergent views (see *Graham Paper Co. v. Pembroke*, 124 Cal. 117, 71 Am. St. Rep. 26)—it is not applicable to the facts of the case at bar. Subject to certain exceptions, none of which is presented in this case, the general rule is that an attaching or execution creditor succeeds to and acquires only the rights of his debtor (*Reynolds v. Fitzpatrick*, 23 Mont. 52; *Oppenheimer v. First Nat. Bank*, 20 Mont. 192; *McAdow v. Black*, 4 Mont. 475), while a purchaser for value and without notice may acquire greater rights and a higher title than his vendor possessed: *Pomeroy's Equity Jurisprudence*, sec. 698. Had the defendant, prior to notice of the plaintiff's claim, paid over the money collected under the levy, the plaintiff would doubtless be without remedy against him. It is plain, however, that notice to the defendant of the sale while he held the funds under the writs was sufficient to save and protect the right of the plaintiff thereto.

3. That the sum of four hundred and thirty-four dollars and thirty-eight cents was one-half of the net proceeds of the ore was not controverted on the trial. Moreover, ²¹² the funds levied upon were net proceeds, within the meaning of the contract between Pohndorf and others and Hughes and others. Hughes and his associates were to furnish and pay for the labor, while Pohndorf, Thompson, and Pearson were bound at their own cost to furnish all things necessary to the proper working

and operation of the mine; and the net proceeds of the ore after milling or reduction were to be equally divided. So the contract provides. It is therefore apparent, at least in the absence of evidence in respect of possible outlay incident to delivery at the smelter, that the expression "net proceeds" was employed and understood as signifying the avails of the ore, less charges of milling and reduction only. The instructions of the court to the effect that the burden was upon the plaintiff to show that there were net proceeds, and that the term meant net value of the ore after deducting all proper charges for mining, hoisting, handling, and smelting and reducing it, were misleading, confusing, and erroneous.

4. Another instruction was to the effect that if, at the time the defendant levied upon the proceeds of the ore, "James A. Murray, one of the owners of the said claim, had forfeited the said lease, and thereupon the said Carston, Wallin, and Olson commenced suits against the said Pohndorf, Thompson, and Pearson to recover the amounts due them, the lease had been canceled and forfeited, the said Pohndorf, Thompson, and Pearson had no right to the net proceeds of the said ore, and you should find a verdict in defendant's favor." With respect to this instruction, it is sufficient to say there was no evidence tending to show that the right of Pohndorf, Thompson, and Pearson to a share of the ore already mined and its net proceeds would be lost or impaired by the act of the owner of the claim in declaring or enforcing a forfeiture of the lease made to Hughes and his mining partners.

Under the instructions of the court the jury were in duty bound to find for the defendant, whereas we are constrained to believe that the evidence tended strongly and without contradiction to establish the plaintiff's right to recover. There ²¹³ was not even a suggestion of, nor was an effort made to show, any fact or circumstance casting doubt upon the genuineness, the validity, or the bona fides of the assignment to the plaintiff.

The order refusing a new trial and the judgment are reversed and the cause is remanded.

FRAUDULENT CONVEYANCES—CHANGE OF POSSESSION. When one of the cotenants of personal property, who is in the exclusive possession thereof, sells his interest in it to a third person, there must be an immediate delivery followed by an actual and continued change of possession, or the sale will be void as to the seller's creditors: *Brown v. O'Neal*, 95 Cal. 262, 29 Am. St. Rep. 111. But in the above case it is said that if the property is in the pos-

session of the other cotenants, the cotenant selling may make a valid sale without delivery.

EXECUTION SALE—WHAT TITLE PASSES.—A sale under an execution passes only the right, title, and interest of the judgment debtor: *Lewark v. Carter*, 117 Ind. 203, 10 Am. St. Rep. 40; the purchaser takes just what title the defendant in execution has, and buys at his peril: *Greer v. Wintersmith*, 85 Ky. 518, 7 Am. St. Rep. 618; but an innocent vendee of the original purchaser will be protected against irregularities in the sale of which he had no notice: *Hudepohl v. Liberty Hill etc. Co.*, 94 Cal. 588, 28 Am. St. Rep. 149, and note.

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[28 MONTANA, 353.]

TRIAL JURY—CHALLENGES.—Either party may use a challenge upon any juror in the box so long as he has one to use at any time before the jury is finally accepted and sworn, and the waiver of one challenge is not a waiver of any subsequent challenge the party is entitled to.

WITNESSES—OPINIONS OF NONEXPERTS AS TO MENTAL CONDITION.—The opinion of a layman or nonexpert as to the mental condition of a person accused of crime, based in part upon facts not derived from his own observation, is incompetent and inadmissible in evidence.

WITNESSES—OPINIONS OF NONEXPERTS AS TO THE MENTAL CONDITION of a person accused of crime are admissible in evidence when based wholly upon their own observations.

WITNESSES—OPINION OF NONEXPERT AS TO MENTAL CONDITION.—A nonexpert witness expressing an opinion as evidence of the mental condition of a person accused of crime must be confined to, and can only speak as of, the time of his observation, and he cannot be permitted to express an opinion as to the temporary or permanent nature of the disease producing such condition in the accused.

WITNESSES—OPINION BY NONEXPERT ON INSANITY. On a trial for homicide a nonexpert witness who has given his opinion as to the sanity of the accused may properly be asked on cross-examination what he means by "insanity" and "unsoundness of mind," if there is no attempt to compel him to give a technical definition or to confuse him with technical distinctions.

WITNESSES—EXPERTS—HYPOTHETICAL QUESTION.—If, on a trial for homicide, insanity is pleaded as a defense, and the prosecution has shown that an unfriendly feeling has existed for some time between the accused and the deceased prior to the killing, the following hypothetical question may be properly asked and answered by an expert witness: "Where a party has a grudge against another and has avowed it, and had in a rational way conversed with lawyers and judges about it, and he should go from them and lie in wait for his enemy or remain in the vicinity until he appeared, and then should go from where he was, draw a revolver, and shoot him, saying, 'Take that,' or words to that effect, and, having shot his enemy, should turn around and say, 'I will go to the jail and give myself up,' and within twenty minutes or half an hour should talk the matter over in a reasonable manner, appar-

ently as conscious as ever he had been immediately before the shooting, what would you say as to the fact of his consciousness and knowledge of right and wrong and knowledge of the unlawfulness of his act at the time of the shooting?"

WITNESSES — EXPERTS — ASSUMPTION OF FACTS PROVED.—The prosecution, in putting hypothetical questions to an expert witness on a trial for homicide, has a right to assume as established, for the time being, all the facts in evidence tending to support its theory of the case, and it is for the jury to say, after considering all the evidence introduced by both sides, whether the facts thus assumed as established for the time being, are really established, and whether the opinion of the witness is worthy of consideration.

WITNESSES—EXPERTS—INSANITY.—A question as to the insanity of the accused on a criminal trial put to an expert need not embrace all the elements of the law of insanity, but may limit the inquiry to the degree of intelligence possessed by the accused under the circumstances of the particular act.

INSANITY AS DEFENSE TO CRIME.—Insanity in the criminal law as a defense to crime is any defect, weakness, or disease of the mind, rendering it incapable of entertaining, or preventing its entertaining in the particular instance, the criminal intent which constitutes one of the elements in every crime. In the formation of this intent there must concur knowledge or intellectual comprehension and the power of choice, and if there is no intent there is no crime.

INSANITY AS DEFENSE TO CRIME.—A person may have mental capacity and intelligence sufficient to distinguish between right and wrong with reference to the particular act in question, and to understand the consequences of its commission, and yet be so far deprived of volition and self-control by the overwhelming violence of mental disease that he is not capable of voluntary action, and therefore not able to choose between right and wrong, and hence incapable of entertaining the intent necessary to constitute a crime.

INSANITY AS DEFENSE TO CRIME—IRRESISTIBLE IMPULSE.—To be criminally responsible, a man must have reason enough to be able to judge of the character and consequence of the act committed, and he must not have been overcome by an irresistible impulse arising from disease affecting the mind.

INSANITY AS DEFENSE TO CRIME—IRRESISTIBLE IMPULSE leading to homicide in an insane person is a good defense, though such insane person was able to distinguish between right and wrong, but with the sane person such impulse is not a defense.

INSANITY AS DEFENSE TO CRIME—IRRESISTIBLE IMPULSE.—If, on a trial for homicide, insanity is pleaded as a defense, the court need not charge on the effect of irresistible homicidal impulse, when the only evidence of such impulse is defendant's statement that a few minutes before the killing he was attacked with a dizzy spell, and had no recollection of what occurred thereafter until the next day. His act must then have been the result of unconsciousness or delirium, while irresistible impulse implies knowledge of right and wrong in some degree.

INSANITY AS DEFENSE TO CRIME—IRRESISTIBLE IMPULSE.—A person who commits a crime under an irresistible impulse resulting from overpowering mental disease, and which is beyond his control, is not criminally responsible therefor.

INSANITY AS DEFENSE TO CRIME—BURDEN OF PROOF.—The burden of establishing the defense of insanity by a preponderance of the evidence is never cast upon the accused, and the legal presumption of sanity is rebutted and disappears whenever sufficient proof is introduced by either side to raise a reasonable doubt of the sanity of the accused. The burden is then cast upon the prosecution to establish the guilt of the accused beyond such reasonable doubt.

TRIAL—INSTRUCTIONS IN CRIMINAL CASE.—Inconsistent instructions on a material point in a criminal case are sufficient to work a reversal of a judgment of conviction.

S. V. Stewart and Hartman & Hartman, for the appellant.

C. B. Nolan, attorney general, and W. F. Sanders, for the respondent.

³⁶² **BRANTLY, C. J.** 1. During the selection of the jury, twelve men being in the box, and both parties having passed them for cause, counsel for state waived their fourth peremptory challenge. The defendant thereupon exhausted his seventh and eighth peremptory challenges, the box being filled again after each challenge. Both parties then having passed for cause, counsel for the state were permitted, over the objection of defendant, to peremptorily challenge one Connor, who was in the box at the time the state's fourth challenge was waived. Connor was ordered to stand aside and another juror was called to take his place. He was found satisfactory to both sides, and thereupon, the defendant waiving further challenges, the jury were sworn. The action of the court in permitting the challenge of Connor is assigned as error. In *State v. Sloan*, 22 Mont. 293, we held that the parties must exercise their right of peremptory challenge alternately, the state exhausting one challenge and the defendant two until both are satisfied or their challenges have all been used. The corollary to this rule is that, where either party fails to challenge in his turn he is deemed to waive the challenge or challenges he might use at that time. But the rule goes no further than is necessary to preserve the alteration required by the statute: Code Civ. Proc., sec. 1059; Pen. Code ³⁶³ sec. 2057. It does not follow that either party waives any other challenge he may still have. His refusal to challenge may be taken by the court as an announcement that he is satisfied with the jury as then constituted, but not that he will be satisfied with it when differently constituted by the change wrought by challenges exercised by the other side. There is no provision of the statute prohibiting either party from thereafter using a challenge upon any juror in the

box so long as he has one to use. He may use it as he pleases at any time before the jury is finally accepted and sworn. We think the court was clearly right in overruling the objection, both upon principle and authority: 1 Thompson on Trials, sec. 94; People v. Ah You, 47 Cal. 121; Fountain v. West, 23 Iowa, 9, 92 Am. Dec. 405; People v. Carrier, 46 Mich. 442; Hamper's Appeal, 51 Mich. 71; Kennedy v. Dale, 4 Watts & S. 176; People v. Montgomery, 53 Cal. 576; State v. Pritchard, 15 Nev. 74.

2. The defense relied on at the trial was insanity. Riblett, a witness for defendant, was his nearest neighbor, having lived upon a farm adjoining the defendant's for several years. He was permitted to detail fully his acquaintance and intercourse with the defendant, and his observation of his conduct and condition during his acquaintance with him, particularly with reference to the two years immediately prior to the shooting. This narration included an account of two attacks of illness suffered by defendant—one during the winter of 1896-97, and the other during the winter following; his incomplete recovery and his subsequent feeble and nervous physical condition during the spring of 1898. It also included several conversations with defendant about the behavior of Ennis and his son toward himself, and defendant's attempts to bring them to punishment, one of which took place two days before the homicide. He also stated that he had heard of the shooting two days after it occurred. He was then asked: "After hearing of the shooting, and taking into consideration the facts that you have testified about, and your long knowledge and acquaintance with Mr. Peel, did you ³⁰⁴ have any opinion then, taken in connection with the shooting, as to the condition of his mind at the time of the shooting?" Upon objection by the state, the court refused to permit the witness to answer, on the ground that the opinion of a layman as to the mental condition of the defendant, based in part upon facts not derived from his own observations, is incompetent. To this ruling the defendant excepted. The question is awkwardly expressed, but it was evidently intended that the witness, in giving his opinion, should base it upon his own observation as detailed by him, and also upon his hearsay knowledge of the facts attending the shooting. As the witness was not an expert, the ruling of the court was clearly correct. While the opinions of nonexpert witnesses are often the best and only evidence at hand touching the mental condition of the person on trial or the validity of whose act

is in controversy, the opinion expressed must be founded upon their own observation: *Territory v. Hart*, 7 Mont. 489, and authorities cited: *Territory v. Roberts*, 9 Mont. 12; 1 Clevenger on Medical Jurisprudence of Insanity, 580. It is only a person skilled in the particular science, art, or trade concerning which the investigation is had who can be permitted to give an opinion founded upon facts learned from other sources than his own observation: Code Civ. Proc., sec. 3146. If he has had an opportunity to observe, he may speak from observation. When he has had no such opportunity, he may hear facts detailed by other witnesses and express an opinion thereon; or the question may be put to him in hypothetical form, founded upon facts thus detailed: *Lawson on Expert Evidence*, p. 221, rule 42. And herein lies the distinction between the office of an expert and that of a layman when called upon in such case for an opinion. If a lay-witness may be permitted to include one material fact or group of facts, learned by hearsay among those derived from his own observation, as in the question under consideration, and to express an opinion thereon, there is no reason why any number of such facts may not be so included. In such case the opinion of the witness, in so ³⁶⁵ far as it would be based upon the extraneous facts, would in no respect be different from that of an expert witness, and the important and substantial distinction between the offices of the two would be entirely destroyed: *Lawson on Expert Evidence*, 538. The witness was afterward permitted to express his opinion as to the mental condition of defendant, basing it upon his own observation. This was within the rule, and the defendant has no cause for complaint.

In this connection the court instructed the witness to express the opinion formed by him with reference to his observations of defendant up to and including the time he last saw him. The witness answered in conformity with this direction, expressing the opinion as still retained by him. Fault is found with this action of the court, counsel for defendant contending that the witness should have been allowed to state his opinion as to the mental condition of defendant at the time of the shooting. Here again we think the court was right, because the nonexpert witness should always speak as of the time of his observation. To have allowed this witness to do otherwise would be equivalent to permitting him to give an opinion upon the character of the mental disease, and as to whether it probably continued up to the date of the shooting. The witness could not

speak of a condition he did not observe, nor should he be permitted to express an opinion as to the temporary or permanent nature of the disease. This is the province of the expert: 1 *Clevenger on Medical Jurisprudence of Insanity*, 588; *Blake v. Rourke*, 74 Iowa, 519; *Denning v. Butcher*, 91 Iowa, 425.

On cross-examination the witness was asked to tell the jury what he meant by "insanity" and "unsoundness of mind." The court directed him to answer. This he did, explaining in his own way what meaning he attached to those terms. There was no attempt to compel him to give a technical definition of them, nor to confuse him by questions pertaining to technical distinctions. This was clearly within the range of proper cross-examination.

3. In rebuttal the state introduced Dr. Miller as an expert ^{see} upon the question of defendant's insanity. Among other hypothetical questions he was asked the following: "Where a party has a grudge against another and had avowed it, and had in a rational way conversed with lawyers and judges about it, and he should go from them and lie in wait for his enemy, or remain in the vicinity until he appeared on the sidewalk, and then should get up and go across the street from where he was, and draw a revolver, and shoot him, saying, 'Take that,' or words to that effect, and, having shot his enemy, should turn around again and say, 'I will go to the jail and give myself up,' and within twenty minutes or half an hour should talk the matter over in a reasonable manner, apparently as conscious as ever he had been immediately before the shooting, what would you say as to the fact of his consciousness and knowledge of right and wrong and knowledge of the unlawfulness of his act at the time of the shooting, from these circumstances?" Defendant objected on the ground that the hypothesis assumed that the defendant entertained a grudge against deceased, and that he was lying in wait for deceased at the time of the homicide—an assumption not justified by the proof; and also on the ground that it involved an erroneous statement of the law of insanity as a defense in criminal prosecutions. The objection was overruled and the witness answered, "I should consider he was conscious of what he was doing." The objection was without merit. The evidence had shown without contradiction that there had been unfriendly feeling between defendant and deceased for some time, though the cause of it did not appear. It had also shown, as set forth in the statement of facts leading up to the homicide, that the defendant had been

charged by deceased with burning the public hall at Ennis; that there had been some talk by deceased and others of hanging defendant for this crime; that he had heard of this talk, and was so wrought up by it that he sought to have deceased and his son punished for a conspiracy to murder him; that, having failed to get the prosecution under way, he had, as a last resort, gone to the judge then engaged in holding court at Virginia City; that upon being told by the judge that he must go elsewhere for advice, he had gone at once to a point near the hotel where deceased was stopping and remained there; that he was armed, and that when he saw deceased leave the hotel and proceed down the other side of the street he immediately went toward him and shot him. It further appeared from the defendant's own statement that though he was entirely innocent of the charge made against him by deceased and his son, he believed they intended to take his life when a suitable opportunity presented itself. In another part of his testimony he had also stated that he had sought out the deceased because he was the only one that he feared of those who attended the meeting at Ennis, where the hanging was discussed, and that he was on friendly terms with everybody in the community except deceased. Can any reasonable person doubt for a moment that the defendant, under these circumstances, if he was sane, entertained toward the deceased and those associated with him the strongest feeling of resentment and ill-will? If he did not he surely was not subject to the passions that ordinarily sway mankind, or else had schooled himself to such a degree of self-control and Christian forbearance as to have become a remarkable instance in proof of the possible attainment by mankind of absolute moral perfection. The state's theory of the case was that defendant was and is so far a reasonable moral agent as to be responsible under the law. Upon this assumption counsel were proceeding, and it was necessary that they be allowed to proceed in this way in order to properly try the case. In putting the hypothetical question to the expert they had a right to assume as established, for the time being, all the facts in evidence tending to support their theory. It was a legitimate inference from the evidence, under this theory, that the defendant retained a grudge against the deceased, and that, prompted by a desire to gratify his feelings of revenge, he lay in wait for the opportunity to strike the fatal blow. It was for the jury to say, after considering all the evidence introduced by both sides, whether the facts thus assumed as established

for the ³⁰⁸ time being were really established, and whether the opinion of the witness was worthy of consideration: Lawson on Expert Evidence, 152, 153; 1 Thompson on Trials, secs. 607-610, and cases cited.

Counsel were not compelled to so frame their question as to embrace in it a statement of all the elements of the law of insanity. Capacity to distinguish between right and wrong with reference to the particular act in controversy is certainly a prerequisite to legal responsibility, and whether or not the defendant possessed such capacity was necessarily a subject of legitimate inquiry in the trial of this case. If he did not possess it, he could not properly be convicted of any degree of homicide. Counsel were properly permitted to direct their inquiry in such a way as to develop proof tending to show the degree of intelligence possessed by the defendant under the particular circumstances. If they choose to limit the inquiry to this particular point and there stop, it was not error in the court to permit it. It was for the court to state the law applicable to this defense upon the facts as they were presented.

4. In this connection complaint is made that the court failed to properly instruct the jury on the law applicable to this defense, the particular criticism being that the instructions are not sufficiently specific as to irresistible impulse. In this, we think, counsel are in error. The court, with the exception hereafter noticed, instructed the jury fully and fairly, and the law as stated in the charge is the more logical rule, if not based upon the weight of authority in this country. Of the several paragraphs of the charge on this phase of the case we quote two as illustrative of the court's view:

"No. 36. You are instructed that if, from all the evidence in the case, you believe, beyond a reasonable doubt, that the defendant committed the crime of which he is accused, in manner and form as charged in the information, and that at the time of the commission of such crime the defendant knew that it was wrong to commit such crime, and was mentally capable of choosing either to do or not to do the act or acts constituting such crime, and of governing his conduct in accordance ³⁰⁹ with such choice, then it is your duty under the law to find him guilty, even though you should believe from the evidence that at the time of the commission of the crime he was not entirely and perfectly sane."

"No. 37. You are instructed that, in order to be criminally responsible, a person must have intelligence and capacity to

have criminal intent and purpose; and if his mental powers are so deficient that he has no will or no conscience or no controlling mental power, or if from the overwhelming violence of mental disease his intellectual power is for the time obliterated, he is not criminally responsible—the question to be determined being whether, at the time of the act, he had the mental capacity to entertain a criminal intent, and whether in point of fact he did entertain it.”

Mr. Bishop (1 Bishop's Criminal Law, sec. 381, subd. 2) says: “Insanity, in the criminal law, is any defect, weakness, or disease of the mind rendering it incapable of entertaining, or preventing its entertaining in the particular instance, the criminal intent which constitutes one of the elements in every crime.” From this definition of insanity, criminal responsibility is to be determined solely by the capacity of the defendant to conceive and entertain the intent to commit the particular crime. If there is no intent, there is no crime. In the formation of this intent there must concur knowledge or intellectual comprehension and the power of choice. An absence of the former necessarily implies the want of the latter, for the latter cannot, in reason, exist without it. On the other hand, the former, as a scientific fact, may exist, in some degree at least, without the latter. It therefore follows that one may have mental capacity and intelligence sufficient to distinguish between right and wrong with reference to the particular act, and to understand the consequence of its commission, and yet be so far deprived of volition and self-control by the overwhelming violence of mental disease that he is not capable of voluntary action, and therefore not able to choose the right and avoid the wrong. The second instruction quoted is taken from the text at page 126, volume 1, of Dr. Clevenger's recent ³⁷⁰ work on Medical Jurisprudence of Insanity heretofore cited. At another place the same author says: “To be criminally responsible a man must have reason enough to be able to judge of the character and consequences of the act committed, and he must not have been overcome by an irresistible impulse arising from disease”: 1 Clevenger on Medical Jurisprudence of Insanity, 174. Assuming, as we do, that Mr. Bishop's definition of insanity is correct, and sufficiently broad to cover all cases where the question of responsibility arises, the statement by Dr. Clevenger is a direct logical result therefrom, and the doctrine that when one commits an act otherwise criminal under an irresistible impulse, which is the result of an overpowering mental disease and

which he cannot control, he is not criminally responsible, must be admitted. Mr. Bishop recognizes the doctrine, basing it upon the law of necessity, and insists that it is the duty of every judge to recognize and apply it as a part of the fundamental law of the land: 1 Bishop's Criminal Law, sec. 383b. Mr. Wharton (Wharton's Criminal Law, sec. 45), after discussing the subject, states the law thus: "The conclusion we must reach, therefore, is that an irresistible homicidal impulse in an insane person is a good defense, though such insane person was able to distinguish between right and wrong. With a sane person, however, it is not a defense, as the law makes all sane persons responsible for their impulses." It is, we think, the more humane doctrine and in accord with the more advanced state of medical science and judicial reason, though courts of high standing—as in New York, California, Kansas, Georgia, North Carolina, Missouri, and others—repudiate it and adhere to the doctrine of the right and wrong test. The following authorities are cited: Taylor's Medical Jurisprudence, 734; Commonwealth v. Rogers, 7 Met. 500, 41 Am. Dec. 458; Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634; Walker v. State, 102 Ind. 502; Conway v. State, 118 Ind. 482; Parsons v. State, 81 Ala. 577, 60 Am. Rep. 193; State v. Windsor, 5 Harr. (Del.) 512; Ortwein v. Commonwealth, 76 Pa. St. 414, 18 Am. Rep. 420; Taylor v. Commonwealth, 109 Pa. St. 262; Commonwealth v. Mosler, 4 Pa. St. 264; Graham v. Commonwealth, 16 B. Mon. 587; Blackburn v. State, 23 Ohio St. 146; State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; State v. Jones, 50 N. H. 369, 9 Am. Rep. 242; State v. Johnson, 40 Conn. 136; Anderson v. State, 43 Conn. 514, 21 Am. Rep. 669; Dejarnette v. Commonwealth, 75 Va. 867; State v. Felter, 25 Iowa, 67; State v. Mcwherter, 46 Iowa, 88; Dacey v. People, 116 Ill. 555; Hochheimer on Law of Crimes, sec. 20.

But while we believe this to be the better rule, we agree with Mr. Bishop where he further says, in speaking of the right and wrong test: "In a case wherein beyond controversy the defect extends only to the intellectual powers, and there is no pretense that the party cannot control his own actions—no proof tending to show any insanity except the partial, which veils simply the understanding and not the whole man—this right and wrong test, thus seen to be the more common form of putting the question to the jury, is correct in legal theory, and practically not misleading. For it should be borne in mind that in all issues the charge to the jury should disclose the

law applicable to whatever facts the evidence tends to establish, not to any which it does not": 1 Bishop's Criminal Law, sec. 386, subd. 2.

Returning now to the test laid down in the instructions quoted, we see that they distinctly recognize the doctrine of irresistible impulse as the result of disease. In our opinion they are well suited to the facts of this case. There was no proof tending to show in the defendant, at the time of the shooting, the existence of an irresistible impulse, except in so far as it might be inferred from the statement of the defendant himself, who testified in his own behalf, and stated that as he left the courthouse he was attacked by a "dizzy spell," and had no recollection of what occurred thereafter until the following morning. Even this would seem to rebut the idea of any such condition, and tend rather to show that the shooting, if the result of any phase of insanity, was the act of unconscious madness or delirium; for logically the expression "irresistible impulse" implies knowledge of right and wrong in some degree, but coupled with it, the absence of power, resulting from a disordered mind, to successfully resist the impulse to do the criminal act. The court could ³⁷² not instruct the jury on every phase or manifestation of insanity. The law was declared generally upon this subject with such suggestions as were suitable to the facts of the case; and it was left to the jury, as was proper, to find from the proof upon the issue of insanity: *Stuart v. State*, 1 Baxt. 178. The court was also careful to draw the distinction between the impulse of anger or passion which does not relieve from responsibility and the phase of insanity which we are here considering. This should be done in all cases of this character; so that the wicked impulses of the evil passions, which every man is under the law bound to keep in restraint, may not be confounded with that phase of mental disease which the law, out of tenderness for human life and liberty, deems a sufficient excuse for crime: *State v. Brooks*, 23 Mont. 146.

5. Upon the burden of proof under the plea of insanity the following instruction was given: "No. 42. You are instructed that the law presumes every person to be sane and responsible for his acts until the contrary be shown by the evidence, and when insanity is set up as a defense to an alleged criminal act, the burden of proof is upon the defendant to show by a preponderance of the evidence that he was affected by insanity, as explained in these instructions, at the time of the act, to such

an extent that he did not know that it was wrong to commit such criminal act, and that he was not mentally capable of choosing either to do or not to do the act or acts constituting such crime, and of governing his conduct in accordance with such choice; but if, upon all the evidence in the case, the jury entertain a reasonable doubt as to the sanity of the defendant at the time of the commission of the act complained of, they must acquit him."

This instruction was followed by another paragraph correctly defining "preponderance of evidence" as applicable to civil cases, thus emphasizing the necessity for the defendant to sustain his defense by a preponderance of the evidence. We think this was prejudicial error. The instruction is inconsistent with itself in that, after telling the jury that the ³⁷³ burden is upon the defendant to establish insanity by a preponderance of the evidence, it again tells them to acquit him if they have a reasonable doubt upon the whole case. It also conflicts in this regard with other instructions as to reasonable doubt. It is wrong in principle, because, under our view of the law, the burden of establishing this defense by a preponderance of the evidence is never cast upon the defendant.

As to the inconsistency of the instruction with itself and with others upon the subject of reasonable doubt, it is sufficient to say that, wherever instructions are upon a material point, the one correct and the other incorrect, this court will not presume that the jury followed the correct instruction, but will reverse the judgment and order a new trial: *State v. Rolla*, 21 Mont. 582.

The first part of the paragraph states a wrong principle. The doctrine of reasonable doubt must be applied to every fact material and necessary to establish the defendant's guilt. It should be applied in all criminal cases—to those in which insanity is the defense as well as others. Yet under this statement the defendant could be acquitted upon a reasonable doubt which might arise only after he had produced proof sufficient to incline the balance in his favor on the issue of insanity. If there should be an equipoise, he could not be acquitted, because the proof would not have weight to the degree at which the reasonable doubt could come to his aid. Under the same condition of proof in a civil case, where the burden was upon the plaintiff to make out his case, the defendant would be entitled to a judgment in either instance. Nor is the fallacy of the position obviated by the statement that the legal presumption of sanity

must be rebutted by the defendant. This presumption is rebutted and disappears whenever sufficient proof is introduced to raise a reasonable doubt as to defendant's sanity. And it makes no difference from which side it comes. From the moment it appears the burden is at once upon the state to establish the responsibility of the defendant, and that beyond a reasonable doubt; for legal responsibility is a necessary ingredient of guilt, and a reasonable ³⁷⁴ doubt of the sanity of the defendant is, in a legal sense, a reasonable doubt of his guilt. If at the end of the state's case no proof has been introduced upon this subject—and the state is not bound to introduce any in the first place—the legal presumption of sanity remains unimpaired and prevails. The burden then devolves upon the defendant to produce some proof tending to show that he was not responsible at the time the criminal act was committed, but he is not bound to produce any more than is sufficient to raise a reasonable doubt. If this is not then successfully rebutted by the state, he is entitled to an acquittal. It is only in this sense that the burden ever rests upon him under Penal Code, section 2081, as was clearly explained by Mr. Justice Hunt in *State v. Brooks*, 23 Mont. 146. In *Davis v. United States*, 160 U. S. 469, Mr. Justice Harlan, in an able and lucid opinion, discusses the question under consideration, collating many of the adjudicated cases. This case is cited with approval in *State v. Brooks*, 23 Mont. 146, and the final summing up of Justice Harlan is there quoted. The question under consideration here was not directly involved in that case, but the conclusion reached in *Davis v. United States*, 160 U. S. 469, is so well supported by reason and authority that we here approve it again and adopt it. In *Territory v. Edmonson*, 4 Mont. 146, and *Territory v. Tunnell*, 4 Mont. 148, a different construction was given a provision substantially the same as section 2081, *supra*: Rev. Stats. 1879, div. 4, sec. 40. We are satisfied that the interpretation there given to this provision was founded on an erroneous view of the law, and to the extent to which these cases conflict with our present conclusion as stated in *State v. Brooks*, 23 Mont. 146, and this case, they are overruled.

6. It is contended that the court erred in defining the expression "heat of passion" in instructing the jury with reference to the crime of manslaughter. The definition given is the same in substance as the one which was disapproved in *State v. Sloan*, 22 Mont. 293. On another trial this can be avoided. No harm resulted from it in this case, ³⁷⁵ since evidently the

jury did not have occasion to consider it, having found the defendant guilty of murder in the first degree: *State v. Brooks*, 23 Mont. 146.

Let the judgment and order refusing a new trial be reversed and the cause remanded, with directions to grant a new trial.

INSANITY—OPINIONS AS TO.—NONEXPERTS may testify as to their opinions of a prisoner's insanity, while both they and experts should state the facts upon which such opinions are based: *Clark v. State*, 12 Ohio, 483, 40 Am. Dec. 481. Nonexpert opinions as to the health and physical condition of another, based upon personal knowledge, are competent: *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138, 52 Am. Rep. 653. The opinion of a nonexpert is not evidence, unless the facts upon which it is based have come under his observation and are stated to the jury: *Doe v. Reagan*, 5 Blackf. 217, 33 Am. Dec. 466. See, too, *Williams v. Spencer*, 150 Mass. 346, 15 Am. St. Rep. 206.

WITNESSES—HYPOTHETICAL QUESTIONS.—When the testimony of an expert is proper, counsel may assume the existence of any facts which the evidence tends to justify, and base their questions upon such assumption: *Wintringham v. Hayes*, 144 N. Y. 1, 43 Am. St. Rep. 725. Opinions of an expert witness must be based upon hypothetical questions containing facts assumed to have been proved, and not upon what he has heard other witnesses testify: *People v. McElvaine*, 121 N. Y. 250, 18 Am. St. Rep. 820.

INSANITY AS A DEFENSE TO CRIME.—A person may not be criminally responsible, though having sufficient mental capacity to know right from wrong, if his will power is so impaired that he cannot resist an impulse to commit a crime, for in such a case he is not of sound mind: *Plake v. State*, 121 Ind. 433, 16 Am. St. Rep. 408. Compare *Gentz v. State*, 59 N. J. L. 488, 59 Am. St. Rep. 612.

IRRESISTIBLE IMPULSE AS A DEFENSE TO CRIME.—An insane irresistible impulse is not a defense to a criminal charge. Though the criminal act is the offspring of an irresistible impulse, and the impulse was irresistible because of mental disease, still the defendant must be held responsible if at the time he had the requisite knowledge of the nature of the act and its wrongfulness: *People v. Hubert*, 119 Cal. 216, 63 Am. St. Rep. 72.

INSANITY—BURDEN OF PROOF.—Insanity as a defense to crime is an affirmative one; hence the burden of proof rests upon the accused to establish his insanity. But this he may do by a bare preponderance of the evidence: *Kelch v. State*, 55 Ohio St. 146, 60 Am. St. Rep. 680, and note.

INSTRUCTIONS, INCONSISTENT.—The giving of inconsistent and contradictory instructions with respect to a material issue is reversible error: *Henry v. State*, 51 Neb. 149, 66 Am. St. Rep. 450.

NOYES v. ROSS.

[23 MONTANA, 425.]

CHATTEL MORTGAGES—FRAUD ON CREDITORS.—A chattel mortgage on a stock of goods which are only reasonable security for the debt secured, providing that the mortgagors may remain in possession and sell at retail in the usual way of business for cash, or on a certain limited credit to responsible persons, and account to the mortgagee for the proceeds of the sales, one of the mortgagors being allowed to retain living expenses from such proceeds, is not per se fraudulent as to prior creditors of the mortgagors, nor is it rendered fraudulent by the fact that the mortgagee, in fear of losing the security, sells the stock of goods at auction prior to the maturity of his debt.

CHATTEL MORTGAGES.—RELATIONSHIP BETWEEN THE MORTGAGOR AND MORTGAGEE does not of itself render a chattel mortgage fraudulent or invalid.

CHATTEL MORTGAGES — PREFERENCES.—Mortgagors have a right to secure by chattel mortgage a debt honestly due, whether to a relative or not, even when such action leaves nothing for the other creditors, provided the transaction is entered into in good faith, with an honest intention.

PARTNERSHIP—PREFERENCES BY.—The principle that the assets of a partnership are for distribution to their creditors does not obtain, without regard to rights already existing. The right to have partnership property first applied to partnership debts is one primarily for the benefit of the partners, and, if they waive such right, firm creditors cannot invoke it to secure preferences over mortgage creditors of the partnership.

CHATTEL MORTGAGES—COMPENSATION TO MORTGAGOR—FRAUD.—The fact that a chattel mortgagor in possession is allowed to draw one hundred dollars per month from the proceeds of the sale of the mortgaged goods from the date of the mortgage to the time of the sale of the goods by the mortgagee is not of itself evidence of fraud in favor of other creditors of the mortgagor.

CHATTEL MORTGAGES—WHEN NOT AN ASSIGNMENT. A chattel mortgage on all of the mortgagor's property intended as a lien only, the mortgagor retaining possession and intending to continue in business, and not to convey the title or right of possession, does not operate as an assignment in favor of the mortgagee as a creditor.

CHATTEL MORTGAGES—RETENTION OF POSSESSION WITH POWER TO SELL IN MORTGAGOR.—A chattel mortgage authorizing the mortgagor to retain possession, with the right to sell a stock of goods mortgaged in the ordinary and usual course of trade, if otherwise good is valid, provided it appears therein that such sales are to be for the benefit of the mortgagee, and that the mortgagor is to account to him for the proceeds of the sales.

CHATTEL MORTGAGES—WHEN NOT AN ASSIGNMENT. The fact that a chattel mortgage upon all of the debtor's property operates to secure certain creditors does not of itself make the security an assignment, where the written contract and the acts thereunder show an intention to give a security only.

CHATTEL MORTGAGES — RETAINING LIVING EXPENSES TO MORTGAGOR.—A chattel mortgage is not invalid

simply because it authorizes one of the mortgagors in possession to retain his necessary living expenses out of the proceeds of sales of the mortgaged property.

CHATTEL MORTGAGES.—UNAUTHORIZED SALE of mortgaged chattels by the mortgagee before the maturity of the debt, the mortgagor acquiescing in the sale and the mortgage being otherwise valid, is not fraudulent and void as to other creditors of the mortgagor who had no lien on the property.

Cullen, Day & Cullen and J. A. Savage, for the appellants.

O. F. Goddard, for the respondents.

434 **HUNT, J.** The contention of appellants is that the mortgage was void because it contained a provision for the use and benefit of the mortgagors, by providing that out of the proceeds of the sales of the property covered by the mortgage the mortgagors were permitted to retain the necessary living expenses of one of them, and because it was provided that the mortgagors might sell the mortgaged property at retail in the usual and general way of business for cash, or on not to exceed thirty days' credit, to responsible parties. We glean from the record the following facts, which should be considered in the determination of the questions presented by the applicants:

1. A. E. Ross and A. A. Fenske formed their partnership to enter into the drug business in June, 1894. At the time they started they borrowed some money from the Yellowstone National Bank, and bought a stock of drugs from one H. T. Ramsey, paying him \$1,500 in money and giving him notes for the balance due him. They afterward added to the stock of goods bought from Ramsey by purchases from wholesale drug houses. On February 16, 1895, an inventory was taken, and the chattel mortgage referred to in the statement of facts preceding this opinion was given to L. H. Fenske for the purpose of securing what they owed to Fenske, to the bank, to Ramsey, and other parties. The firm ran the business until June 24, 1895, purchasing goods from time to time with money taken in by them in their store. The mortgagor Ross drew out from the proceeds of the sales of goods about \$100 a month for his living expenses. A. A. Fenske, the other partner and mortgagor, took no part in the conduct of the business, which never seems to have been profitable, owing to heavy expenses. On June 24, 1895, the mortgagee took possession, which was voluntarily surrendered to him by the mortgagors. At the time the mortgagee took possession the mortgagors were being pressed for payment by certain of their creditors, but the evidence is that the mortgage

was executed to secure the notes which were assumed by the mortgagee, L. H. Fenske. The mortgagee testified that he saw that the business was not paying anything, and he asked the ⁴³⁵ mortgagors for a chattel mortgage, and took the mortgage to indemnify himself for moneys which he agreed to pay to the bank and which were due by the firm, and for money due to Ramsey, and for the sum of \$1,100 due by one of the partners to Ramsey. He said that he understood that an attachment was about to be served upon the property of the mortgagors, and in pursuance of advice by counsel he immediately took possession under the terms of his mortgage, put one Hill in charge of the store, and continued to run the business for a time. The expenses were so heavy, however, that he concluded to sell it all off. While he was running the business he sold in the usual course of trade, and finally closed the whole stock out at auction on November 24, 1895, and bought it in himself for \$1,600. This sale was at public auction, and numerous persons were present, including a representative of these plaintiffs. Some sales on credit had been made while the mortgagors were in charge and before the mortgagee took possession, but about ninety per cent of the sums charged had been collected before this suit was commenced. At the time of the execution of the mortgage in February, 1895, an inventory was taken and the goods and fixtures valued at \$6,620.92, the stock itself being put at a little over \$5,000. From the time of the execution of the mortgage, in February, and up to the time of taking possession by the mortgagee, in June, 1895, the firm's receipts were \$3,054.90. Of this sum \$1,144.05 was deposited in bank. The firm also purchased \$1,635.33 worth of merchandise during that time. The total credit sales for that time were \$860.05. The mortgagor Ross drew out \$385.35. The expenses (rent, clerk hire, etc.) amounted to \$1,525.50. When the mortgagee took possession another inventory was taken, whereat the stock was valued at \$3,872.52 and the fixtures at \$900. From the time of the execution of the mortgage until the mortgagee took possession monthly reports of the business were made to the mortgagee, and the \$1,144.05 deposited in the bank by the firm was put to the credit of L. H. Fenske, the mortgagee, under the terms of the mortgage, and from such deposits ⁴³⁶ there were paid considerable sums due for goods by checks drawn by the mortgagee. When the inventory was made at the time the mortgagee took possession it was computed upon the basis that if a man could be found who desired to go into the drug business in

Billings and invest in a drug store and keep up the business, and was willing to pay for the goodwill and other appurtenances of such a business, the prices were fair and reasonable. The values were with relation to the wholesale price list plus the freight. It appears by a statement in the record that the mortgagee, from the time he took possession of the property, deposited in bank the sum of \$1,518.55; and a recapitulation showing cash receipts since the execution of the mortgage disclosed that \$7,125.01 had been received in that time, out of which there had been paid for merchandise and expenses the sum of \$6,353.75, which, with the sum of \$27.78, representing a loan and cash balance in bank, left a balance of \$743.48 to be applied to the mortgage debt. We notice that included in the expenses from the time the mortgagee took possession in June to November, 1895, he paid to Ross, the mortgagor, the sum of \$515.35 for living expenses. The management of the store was in Mr. Hill, who had been a clerk in the employ of the mortgagors, Ross & Co. The purchaser, after the auction sale, testified that at the time he purchased the goods he thought they were worth about fifty cents on the dollar of the invoice, and that he believed he paid a fair market price for them in November when he bought.

We believe that, upon consideration of all this evidence, the court was justified in finding no actual and intentional fraud on the part of the mortgagors and the mortgagee. The fact that a relationship existed between one of the mortgagors and the mortgagee cannot invalidate the mortgage. If the debt was one honestly due, the mortgagors had a right to secure it, whether due to a relation or anyone else, even though their action left nothing for their other creditors, provided, always, the transaction was in good faith and entered into with honest intention. As evidence of fraud and of an ⁴³⁷ intent to hinder and delay creditors, plaintiffs also mention the fact that part of the amount included in the partners' note to Fenske was an individual indebtedness of \$1,100 due by one of the partners. This statement is correct, as the testimony shows that \$1,100 was loaned by the mortgagee to one of the mortgagors, who used the money borrowed to buy an interest in the new drug firm of Ross & Co. at the time that the partnership between Ross and Fenske was formed. But the mortgagee took the note of the co-partners and the mortgage by the firm in good faith and for value. When the partners executed the mortgage, they had full possession of the property—no lien had attached to it, and, both partners consenting, their right to mortgage the stock in

good faith cannot be denied. The principle that the assets of a partnership are for distribution to their creditors does not obtain, without regard to rights already existing. Again, the right to have partnership property first applied to partnership debts is one primarily for the benefit of the partners, and if they waive such right, firm creditors cannot invoke it to secure preferences over mortgage creditors. These rules rest upon the principle that the right of creditors of a partnership to have partnership debts paid out of partnership property before the debts of an individual partner is not a lien or trust, but is a derivative equity from the partner, and can be made effective only through the equity of an individual partner, to which the creditor is subrogated. It follows that if such partner is in no position to enforce it, a firm creditor cannot. "So if, before the interposition of the court is asked, the property has ceased to belong to the partnership—if by a bona fide transfer it has become the several property either of one partner or of a third person—the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end. It is, therefore, always essential to any preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced": *Case v. Beauregard*, 99 U. S. 119. See, also, *Reynolds v. Johnson*, 54 Ark. 449; *Purple v. Farrington*, 119 Ind. 164; *Smith v. Smith*, 87 Iowa, 93, 43 Am. St. Rep. 359; *In re Estate of Edwards*, 123 Mo. 426.

2. The additional fact that the mortgagor was allowed to draw \$100 per month from the date of the mortgage until the sale of the property by the mortgagee at auction is not of itself or in connection with the other facts in evidence conclusive of fraud. If the mortgagor was employed by the mortgagee after the latter took possession, he was entitled to compensation; if he was not, but was allowed to receive money, it was evidence tending to establish a fraudulent intent on the part of the parties to the mortgage. But as the district court has found the issues generally in favor of defendants, and there is evidence sufficient to justify the action of the court, we cannot now set aside the conclusions of the district court as unwarranted by the evidence. The finding by the judge that the whole transaction was entered into in good faith, and for the purpose of securing defendant L. H. Fenske and certain creditors whose debts were evidenced by the note for \$4,500 made by the mortgagors at the time of the execution of the mortgage, is supported (*Haggin v.*

Saile, 23 Mont. 375); and we shall therefore pass to the question of whether or not, as a matter of law, the mortgage was invalid and operated as a fraud against the creditors of the mortgagors. To that we briefly address ourselves.

Involved in this inquiry is the assertion of appellants that the instrument under consideration is, in effect, an assignment for the benefit of the creditors of Ross & Co., and should be so regarded. The facts, however, will not bear out this statement, for they go to prove that Ross & Co. intended to keep up their business, if they could, and that they merely gave the mortgage to secure Fenske for a debt due to him, and to indemnify him for coming to their relief when other creditors were demanding immediate payment, and threatening to attach their property. As far as we can gather from the evidence in support of the court's finding, they had no intent to ⁴³⁰ divest themselves of title and all control of their stock of goods by conveying the same to a trustee for the purpose of securing a distribution of its proceeds among a portion of their creditors, which would have made the instrument, in legal effect, an assignment for the benefit of their creditors, as was held in *Marshall v. Livingston Nat. Bank*, 11 Mont. 351. Here we find the mortgagors retained possession, and intended to only give a lien on their property, preserving their equities as mortgagors, while in that case the mortgagor intended to make an absolute appropriation of property to his creditors by authorizing immediate possession, passing both the legal and equitable title absolutely beyond his control to the mortgagee, which was to sell, collect the proceeds, pay expenses, pay certain notes, and then account for any balance to the debtor.

The fact that a mortgage upon all of a debtor's property operates to secure certain creditors does not of itself make the security an assignment, where the written contract and the acts thereunder show an intention to give a security only, although it becomes the duty of courts to examine into the circumstances of such transfers very carefully, lest a transaction be given an effect in express contradiction of the intention of the parties to it. Tested by these principles, we conclude that Ross & Co. mortgaged their stock to Fenske, and that the law of chattel mortgages and not that of assignments for the benefit of creditors must be applied to the contract in question.

3. A mortgage which authorizes the mortgagor to retain possession, with the right to sell a stock of goods mortgaged, in the ordinary and usual course of trade, if otherwise good, is on

its face a valid instrument, provided it appears therein that such sales are to be for the benefit of the mortgagee, and he is to account to the mortgagee for the proceeds of the sales. To this extent the courts and text-writers have advanced in later years. We must remember that, as a substitute for possession in the mortgagee, the mortgage must be filed in the office of the county clerk. Secrecy is thus obviated, and opportunity to perpetrate fraud is greatly lessened. ⁴⁴⁰ The records are public, and creditors are thereby constructively advised of the nature and provisions of the mortgages; they have a knowledge that the mortgagor has given a lien upon his stock of goods and of the provisions of the contract granting the lien. It is the policy of the recording acts that has outweighed the policy of an older rule, under which, upon the theory of constructive fraud, mortgages with power to sell the mortgaged goods in the usual course of trade were so often held void.

Mortgages of stocks in trade, with right to sell, cannot be said by judges to be the result of fraudulent intentions on the part of the parties to them, unless such intentions existed in fact; on the contrary, as Justice Brewer said of such transactions in *Etheridge v. Sperry*, 139 U. S. 266, the supreme court could not "be blind to the fact that the tendency of this commercial age is toward increased facilities in the transfer of property, and to uphold such transfers so far as they are made in good faith." In our opinion, where the law requires the filing of a chattel mortgage with the county clerk, as it does in Montana, in cases where the mortgage provides that the property may remain in the possession of the mortgagor (Comp. Stats. 1887, div. 5, sec. 1540; Civ. Code, sec. 3864), and where "any interest in personal property which is capable of being transferred may be mortgaged," which was the law generally before the codes were adopted, as it is now (Civ. Code, sec. 3860), the records give the requisite information to persons dealing with mortgagors, and contracts by way of security upon a stock of goods, with power to sell, under an agreement to apply the avails of sales to the payment of the mortgage debt should be upheld, as promoting, rather than retarding, business arrangements, for they are not only compatible with perfect honesty, but suffer many a business to be kept up which would otherwise fail, and afford many a debtor an opportunity to gain a solid foothold in a community where he might otherwise go to the wall. "It is to be observed," say the supreme court of Vermont in *Peabody v.* ⁴⁴¹ *Landon*, 61 Vt. 318, 15 Am. St. Rep. 903,

"that the mortgagee in such a case places the avails of the sale wholly within the power of the mortgagor, and must trust him, to a greater or less extent, to pay them over on the debt secured. Yet, with the general power of sale, the parties, when the mortgage is made honestly, intend the property conditionally conveyed as security for the payment of the debt, and use it for that purpose. There is no question in regard to the validity of such mortgages between the parties. It is contended that they should not be held fraudulent per se and void, because such mortgages furnish a convenient opportunity to cover the property away from the other creditors for the benefit of the mortgagor when they may be honestly intended and used to secure the payment of the mortgagor's debt in the most economical, and in such an inexpensive manner as to save something for the other creditors, or at least for the mortgagor. It seems to us that, so far as controlled by public policy, the question is for the legislature, rather than for the court, and that the fundamental error of Mr. Pierce, and the authorities which hold such mortgages fraudulent per se and void, lies in assuming that the question is to be determined by the principles of the common law as propounded in *Twyne's Case*, 3 Coke, 80b, rather than by a fair construction of the provisions of the statute and of public policy as indicated by the provisions of the statute."

Jones on Chattel Mortgages, section 381, regards such mortgages as valid, and rests his text upon the principle that the statutes authorizing chattel mortgages where the mortgagor retains possession would fail of their purpose in respect to an important class of property—merchandise held in stock and for sale—if the doctrine of constructive fraud must obtain, and render such instrument void on their face. The authorities for the more modern rule impress us as sound in their reasoning, and we hold that the question of the good faith of a mortgage transaction like the one before us is, on principle, not to be decided as one entirely of law, but is largely one of fact, and must be ruled upon accordingly: *Etheridge v. Sperry*, 139 U. S. 266.

⁴⁴² *Leopold v. Silverman*, 7 Mont. 266, decided by the territorial supreme court, followed the supposed doctrine of *Robinson v. Elliott*, 22 Wall. 513, but since those two decisions the supreme court of the United States, in *People's Sav. Bank v. Bates*, 120 U. S. 556, and *Etheridge v. Sperry*, 139 U. S. 266, already cited, has declined to accede to the doctrine of the case of *Robinson v. Elliott*, 22 Wall. 513, as interpreted in *Leopold v. Silverman*, 7 Mont. 266, while this court has likewise modi-

fied, if it has not drawn away from, the views expressed in *Leopold v. Silverman*, 7 Mont. 266, by already putting itself in accord with the better rule: *Rocheleau v. Boyle*, 11 Mont. 451; *Heilbronner v. Lloyd*, 17 Mont. 299.

4. Nor is the mortgage on its face invalid because it authorized one of the mortgagors to retain his necessary living expenses; for if there be no fraud in law by necessary implication from the mortgage of the stock in trade with power to sell to pay the debt due the mortgagee and account for the sales to him, or generally from a chattel mortgage of all the goods of a merchant, with such powers and agreements contained within it, it is difficult to see how an agreement which allows the mortgagor to draw out enough for his subsistence necessarily has the effect to hinder, delay, or defraud creditors and is a fraud upon them. It certainly is competent evidence to be considered in the determination of the question of the good faith of the parties to the mortgage; but if the whole transaction is honest and has been entered into in good faith by all parties to the mortgage, the only way by which, in most instances, the provisions agreed upon can be effectually carried out, and by which the stock can be sold and the mortgagee paid, and the mortgagor's business still allowed to continue, is to permit the mortgagor to manage the stock with regard to the rights of the mortgagee, and to draw a living from the proceeds while he is doing so. Indeed, if he has no other property or independent means—and a merchant who executes such a mortgage in good faith is usually wholly without ways of living, outside of the net proceeds of current ⁴⁴⁸ sales from his stock—yet it is a fraud for him to draw out enough for him to live upon, such a mortgage is of no benefit to the mortgagor; for he simply cannot remain in possession to fulfill the agreement if he can get nothing to live upon while performing the contract. Carried to its conclusion, it will readily be seen that if such mortgages are to be held fraudulent on their faces because of such agreements, none may make them, except men of independent means or credit; but as we all know that such persons do not, as a rule, have to resort to these liens to protect their creditors, it is more just to establish principles which will give effect to such mortgages by consideration of that common knowledge which tells us that those who mortgage their stocks are too often without any other means at all, and yet by the law they have the power to mortgage whatever they have in an honest effort to pay their debts without resort to assignment for the benefit of creditors. All such agreements,

however, whether in parol or included in the mortgage itself, should be closely scrutinized, for they force the transaction involved close to the line where the law will say the parties have adopted a means whereby creditors are hindered and delayed; yet, notwithstanding all this, such mortgages are not necessarily of such a character that the law will conclusively imply fraud, if none actually exists, but will leave the question of good faith to be tried as one of fact: *Frankhouser v. Ellett*, 22 Kan. 127, 31 Am. Rep. 171. In *Oliver v. Eaton*, 7 Mich. 107, a provision whereby the mortgagor was to apply the proceeds of sales in the purchase of other goods, keeping up the stock, "and in the support of his family," and to pay a certain indebtedness, was held by Campbell, J., not to render the mortgage null and void, but that the intent was for the jury: See, also, *Gay v. Bidwell*, 7 Mich. 519; *Sperry v. Etheridge*, 63 Iowa, 543.

In the very recent case of *Williams v. Mitchell* (Kan. App., Nov. 20, 1899), 58 Pac. Rep. 1025, the case of *Frankhouser v. Ellett*, 22 Kan. 127, 31 Am. Rep. 171, and *Whitson v. Griffis*, 39 Kan. 211, 7 Am. St. Rep. 546, are affirmed in the following language: "It is ⁴⁴⁴ further contended that the mortgage is void upon its face by reason of the following provision: 'It is agreed that said R. Allen Hall shall remain in possession of store, subject to the prior provisions of this mortgage, and after expense of store and living are deducted, the balance of money shall apply on debts secured.' A chattel mortgage will not be declared void upon its face for the reason that the mortgagor retains possession of the stock and is permitted to deduct his living expenses from the proceeds of the sales, 'but will be upheld or condemned according as the arrangement is entered into and carried out in good faith or not.'" We think, therefore, that on the face of the instrument this provision does not require the court to treat it as fraudulent and void.

5. We disagree, too, with the contention that the authority "to sell at retail to regular and other customers in the usual and general way of business for cash, or on not to exceed thirty days' credit to responsible parties," per se renders the mortgage void. We would advise against a provision in a chattel mortgage allowing sales on credit, as its apparent tendency is to vest in the mortgagor a discretion in respect to his sales which may afford him an opportunity to collusively dispose of his stock with intent to delay and defraud unsecured creditors; but while such a provision invites a challenge of the transaction involving it, on the other hand we are not prepared to say that a right to

sell at retail only to customers in the usual and general way of business for cash, or on credit of no more than thirty days, gives so great a latitude to the mortgagor that, as a matter of law, it destroys the security of the mortgage lien, and conclusively negatives all presumptions of good faith, and forbids any inferences other than those of a fraudulent intent. Having shown that mortgages upon stocks of goods, with power to sell therefrom in the usual course of business, are valid, it would seem to follow, where the mortgage may run for a year, that sales at retail (if the business is a retail one generally) for cash, or to responsible parties on a limited credit for thirty days, are not incompatible with the best of faith and perfect honesty, where ⁴⁴⁵ the mortgage provides for accurate accounts of all sales, and that collections and deposits be applied toward the payment of the debt, less necessary and actual current expenses of conducting and maintaining the business. The usual and general way of conducting a drug business in a small town is probably to sell in part on a thirty day credit to responsible people, so that authority to extend such a credit may be but an agreement that sales can be made in the usual and general way of business.

Sales and application of proceeds of sales are strictly within the intended purposes of chattel mortgages of the kind before us, and so long as the parties to them keep within the bounds of the lawful operations of such mortgages, they have a right to insert any reasonable provisions consistent with the intention of applying the stock mortgaged to the liquidation of the debt secured by it. Now, under the stipulation of the mortgage by Ross & Co. to Fenske, the accounts of all sales were to be made monthly, and at the accounting the proceeds of all sales and collections, less expenses, etc., as hereinbefore considered, were to be applied to the payment of the note to Fenske. This stipulation imputes no fraud to either party, for so long as it was complied with, the mortgage was having its desired and lawful effect, and Noyes Brothers and Cutler were not injured; nor were they hurt by an extension of a credit for thirty days, because, as against them or any unsecured creditor in like position, all sales, whether cash or for credits, were to be accounted for, and we are of opinion credit sales should, as between mortgagor and mortgagee, all be deemed cash payments paid over to apply on the note of Ross & Co., although, as between Ross & Co. and Fenske, the credit may not have been collected, and may in fact have been unpaid at the time of the accounting. In *Brackett v. Harvey*, 91 N. Y. 214, an agreement was entered

into between a mortgagor and mortgagee, wherein the mortgagee agreed, among other things, to "take business notes running sixty and ninety days, to be indorsed by said Frank E. Darrow, and apply the same in payment ⁴⁴⁶ of Darrow's said notes as they fall due." Thereafter a mortgage was executed pursuant to said contract, and upon the question of the validity of the mortgage because of such an agreement, the court held that, under a stipulation allowing the mortgagor to sell the mortgaged property, but accounting to the mortgagee for the proceeds and applying them to the mortgage debt, "the proceeds realized by the agent are to be deemed realized by the principal, and, as against an adverse lien, are to be applied on the mortgage debt, even though not actually paid over," and that under that doctrine it is impossible to impute fraud or injury to others in the agreement. The reasoning of the New York court appears to recognize an agency in the mortgagor who sells goods, whereby his act in selling for credit binds the mortgagee to treat the credit as if it were cash; and this way of looking at it finds support in *Conkling v. Shelley*, 28 N. Y. 360, 84 Am. Dec. 348, *Miller v. Pancoast*, 29 N. J. L. 250, *Frankhouser v. Ellett*, 22 Kan. 127, 31 Am. Rep. 171, and other cases referred to hereafter. In the last case Judge Brewer, for the court, said that a mortgagor in possession, with authority to sell and apply the proceeds, acts in respect to the sales "as a quasi agent, at least, of the mortgagee." We do not regard him as an agent in fact, inasmuch as the mortgagor is the owner of the stock mortgaged at least until steps are taken to foreclose his rights, yet he is an owner under an agreement to sell for the benefit of the mortgagee, and to account and to reserve nothing beyond what is actually necessary to be reserved to carry on the business and live upon; and in carrying out this agreement, so far as the rights of third persons who are creditors are concerned, he occupies a relationship toward the mortgagee which should be deemed to bind the mortgagee to the extent of requiring that all credit sales made pursuant to the authority of the mortgage should be treated as cash, and applied on the debt secured by the mortgage. To this extent we concur with Jones on *Chattel Mortgages*, section 422, who says the mortgagor in such cases "may well enough be regarded as the agent of the mortgagee in making the sales and in receiving ⁴⁴⁷ the purchase price." In *People v. Bristol*, 35 Mich. 29, decided before the last Kansas case cited, the court decided that a chattel mortgage is an owner, and could not be the agent of the mortgagee;

but notwithstanding this reasoning, which we think is exact, in a sense, the case is cited to support the text of Mr. Jones, that the mortgagor may "well enough be regarded as the agent"; and, moreover, it was before the supreme court of Kansas, in *Frankhouser v. Ellett*, 22 Kan. 127, 31 Am. Rep. 171, where the mortgagor was characterized as a quasi agent, for Judge Brewer cited the opinion as an authority on another point, but referred to it as sustaining the doctrine of agency, as he applied it. It can be said, therefore, that while the mortgagor is the owner, yet by virtue of the mortgage he has contracted in good faith to conduct his business and sell his stock to liquidate his mortgage debt; and in order to do this and still avoid suspension, he has agreed to turn over all moneys to the mortgagee, only reserving necessary expenses, and that in executing this agreement he will act for the interests of the mortgagee, and, in a measure, in his direct behalf. A mortgagor intrusted with this authority must possess the confidence of the mortgagee, and it is because of this confidence that he is permitted to sell under agreement to turn over and account. His position is, therefore, in this sense, that of an agent of the mortgagee; while as to third persons, in respect to credits, he is to be held an agent: *Gleason v. Wilson*, 48 Kan. 500; *Wilson v. Sullivan*, 58 N. H. 260; *Allen v. Goodnow*, 71 Me. 420; *Sawyer v. Long*, 86 Me. 541.

Lane v. Starr, 1 S. Dak. 107, is an interesting case upon the point just considered. The sheriff there levied upon a stock of drugs and other goods under attachments and executions against one C. J. Lane, then personally in possession. Starr claimed ownership by virtue of a chattel mortgage executed by C. J. Lane to him, and brought action. The question considered was the validity of Starr's mortgage as against the creditors of Lane. The mortgage contained a clause authorizing C. J. Lane to remain in possession until ⁴⁴⁸ the mortgage debt was paid, "as agent of W. A. Lane," and required him to account to W. A. Lane or his assigns, monthly, for all sales until the debt was fully paid. There was a further clause in the mortgage whereby the parties stated their intention to be that "the sale of the property should be absolute to W. A. Lane until the debt was fully paid, the said C. J. Lane acting only as the agent of said W. A. Lane in disposing of the goods, . . . and accounting . . . until the indebtedness was paid." The court held that the provision was a valid one, and that the means employed and consented to were consistent with the trust created to effect a direct and convenient conversion of the mortgaged property

into money to be applied on the debt. The court said this, also: "In this treatment of this case we have not forgotten the theory of our statute, that the title to mortgaged property remains in the mortgagor, nor have we overlooked the apparent difficulty of making the mortgagor, who still owns the goods, the agent of the mortgagee, who does not own them; but this relation of the parties to the title to the property cannot affect the principle involved in this discussion, nor require nor justify the application of a different rule for the discovery of the true character or effect of the agreement. The quality of the transaction, as fraudulent or otherwise, is determined from its effect, possible or probable, upon the interests of other creditors; and the effect of this agreement upon those interests would be precisely the same whether the title passed to the mortgagee or whether it remained in the mortgagor. The presence or absence of vice in this agreement is tested by the inquiry whether the sales were to be made in the interest of the mortgagor and the proceeds controlled by him, so that they might or might not be applied upon the mortgage debt, or whether they were to be made in strict and faithful execution of a real trust, so that every decrease of the security should work a corresponding reduction of the debt": See, also, *Felner v. Wilson*, 55 Ark. 77; *Crow v. Red River Co. Bank*, 52 Tex. 362; *Fink v. Ehrman*, 44 Ark. 310; *Adler v. Claflin*, 17 Iowa, 89.

⁴⁴⁰ 6. Appellants next argue that the court's decision in favor of the respondents is erroneous, because the mortgagee, after he took possession, sold the mortgaged property in the ordinary course of business, and disposed of the same at auction prior to the maturity of the debt, and without authority contained in the mortgage to make any sale at such time. Let us grant that this is all true, and, even so, the plaintiffs are not in a position to complain. The mortgage being a valid security, and possession thereunder having been legally taken, and plaintiffs, as we have shown, having had no lien upon the stock of goods, and the mortgagors having acquiesced in the acts of the mortgagee, as firm creditors, plaintiffs have not shown that they were injured by any acts of the mortgagee done to make his lien effective. The property turned out to be inadequate security for the debt due Fenske, but there having been no fraud or illegality in his acts by which plaintiffs were injured, and plaintiffs having shown no title or right of possession to the property, they are without cause of complaint against the defendants.

Finding no error in the record, the judgment must be affirmed.

Mr. Chief Justice Brantly concurred.

CHATTEL MORTGAGES—SALES BY MORTGAGOR.—The fact that a mortgage of chattels stipulates that the mortgagor may remain in possession, and make sales of the mortgaged property in the usual course of business, does not render the mortgage fraudulent as against any creditors of the mortgagor, except those who have seized the property under a writ of attachment or execution before possession thereof has been taken by the mortgagee: *Francisco v. Ryan*, 54 Ohio St. 307, 56 Am. St. Rep. 711. But see *Birmingham Dry Goods Co. v. Roden*, 110 Ala. 511, 55 Am. St. Rep. 35; *Eckman v. Munnerlyn*, 82 Fla. 367, 37 Am. St. Rep. 109; and the extended note to *Peabody v. Landon*, 15 Am. St. Rep. 912-917.

CHATTEL MORTGAGES—RELATIONSHIP BETWEEN PARTIES.—A chattel mortgage is not void as to the mortgagor's creditors, where the good faith of the transaction is established by strict proof, from the mere fact that the mortgagor is the stepdaughter of the mortgagee: *Whitson v. Griffin*, 39 Kan. 211, 7 Am. St. Rep. 546.

CHATTEL MORTGAGES—PREFERRED CREDITORS.—Chattel mortgages executed at the same time by an insolvent debtor to certain of his creditors, giving them priority but not allowing them to prorate, if made in good faith to secure bona fide debts, does not constitute a voluntary and fraudulent assignment for the benefit of the creditors preferred as against those not preferred: *Hershiser v. Higman*, 31 Neb. 531, 28 Am. St. Rep. 527. See, also, *Cluett v. Rosenthal*, 100 Mich. 193, 43 Am. St. Rep. 446, and note.

CHATTEL MORTGAGES—SALE BY MORTGAGEE.—A chattel mortgage given to secure a bona fide debt, and authorizing the mortgagee to sell the goods and apply the proceeds to the extinguishment of the debt, is valid as against other creditors of the mortgagor: *Benham v. Ham*, 5 Wash. 123, 34 Am. St. Rep. 851.

PARTNERSHIP—RIGHTS OF CREDITORS.—The right of firm creditors to payment out of the partnership assets to the exclusion of the separate creditors of the partners results solely from the right of the partners to have the joint estate thus applied. The rule is for the benefit of the partners themselves. The equity of the creditor is of a dependent and subordinate character: *Farwell v. Huston*, 151 Ill. 239, 42 Am. St. Rep. 237. See, also, *Smith v. Smith*, 87 Iowa, 93, 43 Am. St. Rep. 359. And a partnership may prefer some of its creditors to others: See extended note to *Smith v. Smith*, 43 Am. St. Rep. 373.

STATE v. McCLELLAN.

[28 MONTANA, 582.]

CRIMINAL LAW—ALIBI.—EVIDENCE of an alibi is competent under a plea of not guilty.

CRIMINAL LAW—ALIBI—BURDEN OF PROOF.—Alibi is not a special defense changing the presumption of innocence, or relieving the prosecution of its burden of proving the guilt of the accused beyond a reasonable doubt.

CRIMINAL LAW—ALIBI—BURDEN OF PROOF.—The burden of proof is not changed by the defense of an alibi, and if the evidence of the accused upon that point raises a reasonable doubt of his guilt, the jury must acquit, although not satisfied that the alibi is clearly established as a fact.

TRIAL—INSTRUCTIONS.—ERROR CANNOT BE PREDICTED upon the giving of an instruction requested by the party complaining.

CRIMINAL LAW.—ALIBI AS A DEFENSE NEED NOT BE PROVED by a preponderance of the evidence. Evidence only tending to prove it permits its consideration as raising a reasonable doubt as to the guilt of the accused.

WITNESSES—EXPLANATION OF IMPRISONMENT OF.—If a prosecuting witness testifies that he has been in jail, he may explain the circumstances of his imprisonment.

WITNESSES—EXAMINATION OF.—If a witness testifies that the prosecuting witness had paid out money for drinks before the alleged crime was committed, it is competent on cross-examination to test the witness' means of knowledge concerning the money paid out, and to show that the prosecuting witness had paid out and expended all of his money before the crime charged was committed.

TRIAL—INSTRUCTIONS—CONDITION OF WITNESS.—An instruction cannot single out any particular witness and direct the jury to consider his condition in particular at the time of the transactions concerning which he has testified.

TRIAL—INSTRUCTIONS ALREADY GIVEN or sufficiently covered by other instructions given are properly refused.

R. L. McCulloch and Crutchfield & Draffen, for the appellants.

C. B. Nolan, attorney general, for the state.

584 HUNT, J. Defendants appeal from a judgment of conviction of robbery and from an order overruling their motion for a new trial.

1. On the trial defendants introduced evidence tending to support an alibi. The court gave the following instruction at the request of the state (No. 13): "The court instructs the jury that the defense of alibi, to be entitled to consideration, must be such as to show that at the very time of the commission of the crime charged the accused was at another place, so

far away or under such circumstances that he could not, with any ordinary exertion, have reached the place where the crime was committed, so as to have participated in the commission thereof. The burden is upon the defendant to prove this defense"; and then instructed as follows, at the defendants' request (No. 14): "The court instructs the jury that one of the defenses interposed by defendants in this case is what is known in law as an alibi; that is, that the defendants were at another place at the time of the alleged commission of the crime. If proved—and all of the evidence bearing upon that point should be carefully considered by the jury—or if, in view of all the other evidence, the jury have any reasonable ⁵³⁵ doubt as to whether these defendants were in some other place when the crime is alleged to have been committed, they should give the defendants the benefit of the doubt and find them not guilty. . . . The court instructs the jury that, as regards the defense of an alibi, the defendants are not required to prove it beyond a reasonable doubt to entitle them to an acquittal. It is sufficient if the evidence upon that point raises a reasonable doubt of their presence at the time and place of the commission of the alleged crime."

Defendants insist that the first of these instructions quoted was erroneous in itself, and not cured by the two, or either of them, thereafter given. This contention is sound. Evidence of an alibi is competent under defendant's plea of not guilty. No special averment need be made to warrant the introduction of testimony in support of it. The state must prove the presence of the defendant as part of the essence of the crime as charged, except, of course, where such presence is unnecessary, but that phase of the law we need only mention. There is no prima facie case without showing the presence of the defendant; therefore defendant may rebut the evidence of the fact of his presence by evidence of the fact that he was not present. Alibi is not a special defense changing the presumption of innocence or relieving the state of its burden of proving the guilt of the defendant beyond a reasonable doubt: 1 Bishop's Criminal Procedure, sec. 1066. The defendant is not bound to establish it by a preponderance of the evidence: *State v. Spotted Hawk*, 22 Mont. 33. It is true that, when the state has made out a prima facie case of guilt, the burden is then upon the defendant to rebut such a showing; but if he relies upon an alibi, he is not obliged to prove it as an effect by a preponderance of evidence, for he need only rebut the evidence of his presence by such an

amount of evidence as will, upon a consideration of the whole case, raise a reasonable doubt of his guilt of the crime for which he is on trial: *Schultz v. Territory* (Ariz., Feb. 23, 1898), 53 Pac. Rep. 352. It is a necessary sequence of the statement that, when the defendant must be proven guilty by the state ³²⁶ beyond a reasonable doubt, if there is a reasonable doubt whether he was present or absent when and where the crime was committed, a reasonable doubt of his guilt has arisen, and acquittal must follow.

The somewhat confused question of how the defense of an alibi relates to the whole case in criminal law simplifies itself when we discard the illogical doctrine that it is an affirmative defense, to be proved by the defendant, and substitute therefor the doctrine, which easily flows from the premises already stated, that it is but one of the many defenses offered in rebuttal of the state's evidence, carrying with it to the defendant no burden of proof other than the obligation to introduce evidence sufficient to raise a reasonable doubt. This he may do by evidence sufficient to raise a reasonable doubt of his presence at the place where the act was done, and this doubt may arise without its springing from an affirmatively proved fact that he was somewhere else at the time and could not have committed it: *Code Civ. Proc.*, sec. 3101; *Commonwealth v. Choate*, 105 Mass. 451; *Johnson v. State*, 21 Tex. App. 368; *State v. Taylor*, 118 Mo. 153; *Peyton v. State*, 54 Neb. 188.

Subjected to the test of these principles, instruction No. 13 was erroneous. Its effect was to prevent the jury from giving consideration to the defendants' evidence tending to establish an alibi unless they had carried their burden and proved the defense, whereas the court ought to have charged that it was the duty of the jury to consider all the evidence before them, including that bearing upon the alibi, and conclude from the whole thereof whether the guilt of the defendants was proven beyond a reasonable doubt. It follows that the burden of proof was not altered by the defense of an alibi. If the defendants' evidence upon that point raised a reasonable doubt of their guilt, it became the duty of the jury to acquit, even though they were not satisfied that the alibi was clearly established as a fact: *State v. Taylor*, 118 Mo. 153; *Walters v. State*, 39 Ohio St. 215; *People v. Roberts*, 122 Cal. 377.

⁵³⁷ What we have just said pertains in many respects to instruction No. 14, given at defendants' request; although, were it not for the greater and further extending error throughout

instruction 13, given at the instance of the prosecution, we should not reverse the case for the erroneous principle announced in No. 14, inasmuch as defendants cannot predicate error upon the giving of an instruction requested by themselves: *Territory v. Burgess*, 8 Mont. 57.

Instruction No. 15 was not consistent with No. 13. The one (No. 13) required the defendants to prove an alibi and authorized an acquittal on that ground only if the defendants proved the alibi. Evidence only tending to prove it did not permit the consideration of the alibi as a defense. It was useless to defendants unless they had established the fact. Thus, a reasonable doubt of the presence of the defendants at the commission of the offense charged could not avail them, for they were obliged to prove their absence as a fact in negation of the state's necessary proof of the fact of presence. No. 15, on the other hand, told the jury to acquit if they had a reasonable doubt of defendants' presence at the time and place of the commission of the alleged crime. To clearly reconcile these confusing statements is impossible. The supreme court of Iowa, in *State v. Maher*, 74 Iowa, 77, has said that substantially similar charges are not necessarily inconsistent or contradictory, resting their opinion upon the difference between a defense and the evidence tending to establish a defense. But the learned court assume, as a matter of course, that if the alibi is not established by a preponderance of evidence, it is not to be considered as proved, and that, unless so proved, it can have no consideration in controlling their finding on the defense of an alibi. With this assumption we cannot agree. In our opinion, too, the argument that a jury would be able to draw the distinction recognized by the Iowa court, at least without special explanation of its possible existence, is strained. The emphasized error in No. 13 cannot well be harmonized with the proposition in No. 15 without overlooking the full applicability ⁵³⁸ of the doctrine of reasonable doubt to the whole case; and for this reason the instructions are misleading.

The discordance between the rule that a reasonable doubt justifies an acquittal, yet that, where defendants rely upon an alibi, they must prove it by a preponderance of evidence, is especially well pointed out by the very strong reasoning of Chief Justice Adams in his dissenting opinion in *State v. Hamilton*, 57 Iowa, 596, and by Judge Fuller, dissenting, in *State v. Thornton*, 10 S. Dak. 349.

In conclusion, our opinion is that instruction No. 13 was radically wrong, and that the prejudice done by it to the defendants' rights was not cured by instruction 15, for the two are inharmonious and misleading.

We will briefly notice a few points that are apt to arise on another trial of the case.

2. The prosecuting witness testified on his cross-examination that he had been in jail in the springtime of the season of the trial. On redirect examination the county attorney asked him to state why he had been in jail. The defendants objected and the court overruled the objection. The court was clearly correct. Doubtless the purpose of eliciting the fact from the witness that he had been in jail was to affect the credibility of his testimony, so it became admissible for him to explain the circumstances of his imprisonment.

3. A witness for the state testified that the prosecuting witness had been drinking with the defendants in a saloon about the time of the alleged robbery. On cross-examination he testified to the fact that the prosecuting witness was "treating" other persons and "paying for the drinks." The defendants then interrogated the witness with a view of eliciting how much money the prosecuting witness expended in the saloon on the evening of the alleged robbery. The court stopped the examination, for the reason that it was not proper cross-examination. We think the court erred in this ruling. The witness having testified to the fact that the prosecuting witness had paid out money for drinks before the alleged crime was committed, it was competent on cross-examination ⁵³⁹ to test the witness' means of knowledge concerning the money paid out, and to show, if it could be shown, that the prosecuting witness had expended all the money he had before the crime charged was committed.

4. The defendants asked for an instruction telling the jury that it was their duty to take into consideration "the condition the witness was in at the time of the transactions concerning which he testifies, as a test of the accurateness of his statements." It was not error to refuse an instruction which singled out one witness and directed the jury to consider his condition in particular.

5. The court refused to charge that the jury had no right to disregard the testimony of the defendants merely because they were the defendants and stood charged with the commission of a crime; and furthermore, that the defendants' testimony should be fairly and impartially considered together with

all the other evidence in the case. There was no error in the refusal of the court to give this instruction, for the court charged that the defendant in a criminal action may testify in his own behalf, and that the jury, in judging of his credibility and the weight to be given his testimony, should take into consideration the fact that he is the defendant, and the nature and enormity of the crime of which he is accused. There was also a general charge that a witness is presumed to speak the truth; but that this presumption might be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence, and that the jury were the exclusive judges of his credibility. We hold that this was sufficient, and that there was no error in refusing the instruction requested.

6. Appellants make the point that the evidence is insufficient to sustain the verdict. There was ample evidence to warrant the submission of the case to the jury.

The judgment and order appealed from are reversed and the cause remanded, with directions to proceed as herein indicated.

DEFENSE OF ALIBI—BURDEN OF PROOF.—It is error to instruct the jury that the burden of proof is upon the accused to establish an alibi by a preponderance of the evidence. The setting up of the alibi does not change the presumptions nor the burden of proof, and if because of it or anything else the jury is not satisfied beyond a reasonable doubt of the guilt of the accused, he should be acquitted: *State v. Ardoin*, 49 La. Ann. 1145, 62 Am. St. Rep. 678, and note.

DEFENSE OF ALIBI—REASONABLE DOUBT.—Whenever the evidence introduced to support the defense of an alibi creates a reasonable doubt of the defendant's guilt, he is as much entitled to an acquittal as if the reasonable doubt had been created or produced by any other legitimate evidence: *Prince v. State*, 100 Ala. 144, 46 Am. St. Rep. 28, and note.

INSTRUCTIONS.—It is not error to refuse to give an instruction the substance of which is covered by another instruction already given: *State v. Kuhlman*, 152 Mo. 100, ante, p. 438.

AN INSTRUCTION GIVEN AT THE REQUEST OF A PARTY cannot be complained of by him: *Louisville etc. R. R. Co. v. Markee*, 108 Ala. 160, 49 Am. St. Rep. 21. See, too, *Ferguson v. State*, 53 Neb. 452, 66 Am. St. Rep. 512.

INSTRUCTIONS—SINGLING OUT A WITNESS.—A court must not single out a witness when the testimony is conflicting, and direct the jury to find according to his evidence: *Harris v. Murphy*, 119 N. C. 84, 56 Am. St. Rep. 656.

CASES
IN THE
SUPREME COURT
OF
OREGON.

REINSTEIN v. ROBERTS.

[84 OREGON, 87.]

REPLEVIN—EVIDENCE OF OWNERSHIP—CHATTEL MORTGAGE AS.—A chattel mortgage is a conditional sale of personal property, and, after a breach of the condition, the mortgagee has a qualified ownership in the property mortgaged. Hence, if the mortgagee, after default, brings an action to recover the property, or damages for its detention, in case a delivery cannot be had, the mortgage is evidence of such ownership, and is admissible in evidence to prove it, even under an allegation of absolute ownership.

CHATTEL MORTGAGES—SUFFICIENCY OF DESCRIPTION—PAROL EVIDENCE.—A chattel mortgage on a crop of hops, described as growing upon the donation land claim of a person named in a designated county of the state of Oregon, is sufficiently definite in description to justify the admission of parol testimony, in a controversy between the parties, to identify the property, as, under the donation laws of that state, a person could obtain but one gift of land from the government, and if there was more than one person of the same name who had obtained a donation, the number of the notification and claim would enable a surveyor to locate the premises. In such a case, a partial description, by metes and bounds, given in the mortgage, may be regarded as surplusage.

EVIDENCE, PAROL—IDENTIFICATION OF PROPERTY COVERED BY A CHATTEL MORTGAGE.—As between a mortgagor and mortgagee of personal property, and also as between such mortgagee and a person who has succeeded to the interest of the mortgagor, with actual notice of the mortgage, parol testimony is admissible to identify the property which was intended to be given as security.

Action by Reinstein against Roberts and others. The defendants obtained a judgment and the plaintiff appealed.

J. J. Daly and Austin F. Flegel, for the appellant.

Reuben P. Boise, Sibley & Eakin, and J. A. Sibley, for the respondents.

88 MOORE, J. This is an action to recover one hundred and ninety-two bales of hops, or the value thereof in case delivery could not be had, and damages for their detention. After the action was commenced, plaintiff obtained possession of one hundred and forty-five bales of the property sought to be recovered upon his claim for the immediate delivery thereof. The defendants denied the material allegations of the complaint, and alleged that they were the owners and entitled to the possession of the hops so obtained by plaintiff, which were of the reasonable value 89 of seventeen hundred and twenty-one dollars and twenty-four cents, and that by reason of the unlawful taking they had sustained special damage in the sum of five hundred dollars. These allegations of new matter having been denied, a trial was had, at which plaintiff, to sustain the allegations of the complaint, offered in evidence a chattel mortgage executed by defendants to him September 9, 1895, which recited a loan of two hundred and fifty dollars, and guaranteed such further advances as might be necessary, not exceeding the sum of seventeen hundred and fifty dollars, in consideration of which they covenanted to care for and cultivate during the year 1895 the crop of hops growing upon three parcels of land in Polk county, described as follows: "All three pieces situated upon that part of the donation land claim of James Morris and Sarah Morris, his wife, notification No 115, and claim No. 39, in township 7 south, range 4 west, Willamette meridian; running thence west two and fifty-nine hundredths rods; thence north eighty rods to the place of beginning, containing one hundred and twenty-nine and thirty-five one-hundredths acres, more or less; fifty-three acres being set out to hops." The defendants also covenanted to harvest, dry, and bale said hops, and, not later than October 5, 1895, deliver the same to plaintiff, that he might dispose of them, and reimburse himself out of the proceeds for advances, charges, and expenses, including a commission of one cent per pound upon the entire crop. Said mortgage was conditioned that if defendants kept and performed the covenants therein it should be void. The court sustained an objection to the introduction of the mortgage in evidence on the ground that it was incompetent, irrelevant, and immaterial, to which ruling an exception was saved. The court also refused to permit plaintiff to answer the following questions, viz.: "Are you acquainted with the crop of hops described in the instrument just offered in evidence? . . . Where were the said hops growing when you entered into this

contract?"—to which ⁹⁰ action plaintiff's counsel excepted. In submitting the cause to the jury, the court instructed them to find that the defendants were entitled to the recovery of the hops taken from them by plaintiff, or, if delivery thereof could not be had, that they recover from him the sum of sixteen hundred and seventy-one dollars and fifteen cents, as the value thereof, to which charge an exception was saved; and judgment having been rendered on the verdict returned in accordance with such instruction, plaintiff appeals.

1. The action having been commenced after the expiration of the time in which defendants agreed to deliver the hops, and the complaint having alleged that plaintiff was the owner and entitled to the possession thereof, the questions presented for consideration are whether a chattel mortgage, after default, is evidence of the mortgagee's ownership of the property therein described; and, if so, was the mortgage in question, as between the parties thereto, sufficiently definite in description to let in parol testimony to identify the property and prove the ownership? The law is settled in this state that a chattel mortgage is a conditional sale of personal property, and that after a breach of the conditions the mortgagee has a qualified ownership of the property hypothecated to him as security for the payment of a debt or the performance of an obligation: *Case Machine Co. v. Campbell*, 14 Or. 460; *Hembree v. Blackburn*, 16 Or. 153; *Marquam v. Sengfelder*, 24 Or. 2. It has also been held that, under an allegation of absolute ownership, the mortgagee of personal property, upon default of the mortgagor, may maintain an action for its recovery, and claim immediate delivery thereof in such action: *Moorhouse v. Donaca*, 14 Or. 430. It is manifest from these decisions that the complaint stated facts sufficient to constitute a cause of action, and that a breach of the conditions of the ⁹¹ mortgage having occurred, the instrument is sufficient proof of the mortgagee's qualified ownership of the property therein described.

2. The decision of the case must, therefore, depend upon a consideration of the sufficiency of the description of the property mentioned in the mortgage. In *Spaulding v. Mozier*, 57 Ill. 148, suit was instituted to correct a mistake in the description contained in a chattel mortgage of property which was located in lot 1, instead of lot 11, in a certain block in the village of Highland Park, Illinois; but it was held that the mistake complained of was wholly immaterial, and the court re-

fused to grant the relief which was sought, Mr. Justice Scott saying: "That part of the mortgage that designates the property as being then situated 'on lot one, block number eighteen, in the village of Highland Park,' may be rejected as surplusage, and without it the description of the property conveyed is perfect." In *Baldwin v. Boyce*, 152 Ind. 46, a chattel mortgage described the property intended to be affected thereby as, "all and singular, the restaurant and hotel furniture and fixtures located in and situated in and about the first, second, and third stories of No. 313 East Main street, consisting of the following articles," etc., without referring to the town, county, or state in which said street was situated. The mortgage recited, however, that the mortgagor, of Delaware county, in the state of Indiana, mortgages to Mary Baldwin, etc.; that the property was in the mortgagee's possession, where it was to remain until the note secured by the mortgage should mature; and it was held that the property was bound by the mortgage, even in the hands of one who had purchased the same from the mortgagor. It will be observed, from an examination of the description of the land upon which the hops ⁹² were stated to have been growing in 1895, that it was the donation land claim of Jesse Morris, in township 7 south, of range 4 west, of the Willamette meridian, in Polk county, Oregon. Under the donation laws of Oregon, a person could obtain but one gift of land from the government; and this being so, if there were more than one Jesse Morris who had obtained a donation, the number of the notification and claim would enable a surveyor to locate the premises; and hence the partial description by metes and bounds given in the mortgage may be regarded as surplusage.

3. The rule is quite general that, as between the mortgagor and mortgagee of personal property, and also as between such mortgagee and a person who has succeeded to the interest of the mortgagor with actual notice of the conditional sale, parol testimony is admissible to identify the property which was intended to be given as security: *Cobbey on Chattel Mortgages*, sec. 188; *Jones on Chattel Mortgages*, sec. 64; *Sommer v. Island Milling Co.*, 24 Or. 214; *Cummings v. Tovey*, 39 Iowa, 195; *Clapp v. Trowbridge*, 74 Iowa, 550; *Plano Mfg. Co. v. Griffith*, 75 Iowa, 102; *American Well Works v. Whinery*, 76 Iowa, 400; *Dodson v. Dedman*, 61 Mo. App. 209; *Dodge v. Potter*, 18 Barb. 193; *Goulding v. Swett*, 13 Gray, 517; *Gurley v. Davis*, 39 Ark. 394; *Ranck v. Howard-Sansom Co.*, 3 Tex. Civ. App. 507; *Duke v. Strickland*, 43 Ind. 494; *Ebberle v.*

Mayer, 51 Ind. 235; Burns v. Harris, 66 Ind. 536; Tindall v. Wasson, 74 Ind. 495; Buck v. Young, 1 Ind. App. 558; Koehring v. Aultman, 7 Ind. App. 475; Morris v. Connor, 108 N. C. 321. Under this rule, we think the chattel mortgage in question contained, as between the mortgagors and mortgagee, a sufficient description to permit it to be ^{as} offered in evidence to prove plaintiff's qualified ownership of the hops, and that, as between the said parties, parol testimony was admissible to identify the property intended to be hypothecated; and this being so, the court erred in refusing to permit the mortgage to be received in evidence, in not allowing plaintiff to identify the property and in charging the jury to return a verdict for defendants, and hence it follows that the judgment is reversed and the cause remanded for a new trial.

CHATTEL MORTGAGES—SUFFICIENCY OF DESCRIPTION—PAROL EVIDENCE.—A description in a chattel mortgage is sufficient if it will enable third persons, aided by the inquiries which the instrument indicates and directs, to identify the property: *Davis v. Pitcher*, 97 Iowa, 13, 59 Am. St. Rep. 392. Oral evidence is admissible for the purpose of applying the terms of a writing to the subject matter, and removing any ambiguity arising from such application: *Stoops v. Smith*, 100 Mass. 63, 97 Am. Dec. 76, 1 Am. Rep. 85; *Pursley v. Hayes*, 22 Iowa, 11, 92 Am. Dec. 850; *Lanman v. Crooker*, 97 Ind. 163, 49 Am. Rep. 437; note to *Harris v. Murphy*, 56 Am. St. Rep. 661. Parol evidence is admissible to identify the property enumerated in a chattel mortgage, though it may be minutely described: See monographic note to *Barrett v. Fisch*, 14 Am. St. Rep. 289, on sufficiency of description of property in chattel mortgages, and compare *Stewart v. Jaques*, 77 Ga. 365, 4 Am. St. Rep. 86.

YOUNG MEN'S CHRISTIAN ASSOCIATION v. CROFT.

[24 OREGON, 106.]

MORTGAGES—ASSUMPTION OF MORTGAGE DEBT—NONLIABILITY.—A grantee of mortgaged premises, who accepts a deed thereto and agrees therein to pay the mortgage debt, is not personally answerable therefor if his immediate grantor was not personally bound.

Suit to foreclose a mortgage. On October 19, 1889, M. W. Gay, the owner of certain city lots, mortgaged them to W. G. Register to secure the payment of his note for two thousand dollars, due in one year. On December 4, 1889, the note and mortgage were assigned to the plaintiff association. On October 23, 1889, Gay conveyed the property to Mary C. Hill and

H. E. Bristow, by a deed with warranty against all encumbrances, except the mortgage. These grantees did not assume or agree to pay the debt secured by the mortgage. On April 3, 1893, for the expressed consideration of four thousand eight hundred dollars, Mary C. Box, formerly Hill, Thomas Box, her husband, and H. E. Bristow, conveyed the lots to the defendant H. M. Cake, by a deed with warranty against all encumbrances, except the mortgage, but this deed recited that Cake assumed and agreed to pay the mortgage debt. On June 18, 1894, Cake conveyed the lots to the defendant, Mary E. Croft, with a similar warranty and exception. She did not assume or agree to pay the mortgage debt. The association brought suit to foreclose the mortgage and to recover a personal decree against Cake. There was a decree of foreclosure, but the suit was dismissed as to the defendant Cake, and the plaintiff appealed.

Wallace McCamant and Snow & McCamant, for the appellant.

William M. Cake, for the respondent.

¹⁰⁸ MOORE, J. This appeal presents the single question whether the grantee of mortgaged premises, who accepts a deed thereto containing a recital to the effect that he assumes and agrees to pay the mortgage debt, is liable therefor ¹⁰⁹ when his immediate grantor was not personally bound. The evidence tends to show that at the time Cake purchased the lots in question he considered them worth about three thousand six hundred dollars; that he paid on account of the purchase the sum of one hundred and fifty dollars, and executed to Mary C. Hill and H. E. Bristow a deed of unencumbered real property, which he valued at about fifteen hundred dollars; and from these facts it is argued by plaintiff's counsel that the mortgage debt formed a part of the consideration of Cake's purchase, and having, by his acceptance of the deed, assumed and agreed to pay the said debt, his grantors thereby created a fund for plaintiff's benefit, of which Cake was trustee, and, this being so, the law supplies the want of privity of contract between him and the mortgagor by the fiction of an implied promise, which a court of equity will enforce. Defendant's counsel insist, however, that inasmuch as Mary C. Hill and H. E. Bristow were not personally liable for the payment of the mortgage debt, they did not become Cake's sureties by his

assumption and agreement to pay it; and hence, as against him, they could not be subrogated by any payment they might make, and as the mortgagee could take no better title than they possessed, it cannot recover a personal judgment against Cake upon his covenant.

It is impossible to reconcile the conflict of judicial utterance upon the question under consideration, but we believe the weight of authority supports the principle for which defendant contends. In *Parker v. Jeffery*, 26 Or. 186, the defendants, Robinson Brothers, having entered into a contract with the city of Portland for the construction of a sewer, stipulated that they "would pay all sums of money due at the completion of the work, or thereafter to become due, for material used in, and labor performed on, or in connection with, said ¹¹⁰ work," and to secure the faithful performance of this contract they executed a bond to the city, in which the defendants Jeffery and Bays joined as sureties. The plaintiff, having sold and delivered to Robinson Brothers material to be used in the construction of the sewer, and not having been paid therefor, commenced an action against said sureties to recover the amount so due him, and it was held that he could not recover, because it did not appear that the contract had been entered into directly and primarily for his benefit. To the same effect is the case of *Washburn v. Interstate Inv. Co.*, 26 Or. 436, in which Bean, C. J., says: "The prevailing doctrine in this country undoubtedly is that, where one person, as a consideration or part consideration for an executed contract, promises another, for a consideration moving from him to pay or discharge some legal obligation or debt due from such other to a third person, the latter, although a stranger to the consideration and not an immediate party to the contract, may maintain an action thereon if it was made directly and personally for his benefit."

In *Brower Lumber Co. v. Miller*, 28 Or. 565, 52 Am. St. Rep. 807, in construing a clause contained in a bond given to the city of Portland for the faithful performance of the stipulations of a contract for making a street improvement, it was held, in effect, that inasmuch as the city was not liable to the persons who sought to take advantage of the condition of the bond, there was no consideration for the stipulation to pay for the material used in or the labor performed upon the improvement. The conclusion arrived at in that case seems to have been based upon the rule announced by Mr. Justice Allen, in *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195, in which he says: "To

give a third party, who may derive a benefit from the performance of the promise, an ¹¹¹ action, there must be (1) an intent by the promisee to secure some benefit to the third party; and (2) some privity between the two, the promisee and party to be benefited, and some obligation or duty owing from the former to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally." In *King v. Whitely*, 10 Paige, 465, it was held that where the grantor of mortgaged premises is not personally liable for the payment of the debt thereby secured, the person to whom he conveys the land by a deed, which recites that the grantee assumes the payment of the debt as a part of the consideration, is not liable to the holder of the mortgage for any deficiency that might exist upon a sale of the premises under a foreclosure of the mortgage: See, also, as illustrating this principle, *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 137; *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Pardee v. Treat*, 82 N. Y. 385; *Garnsey v. Rogers*, 47 N. Y. 233, 7 Am. Rep. 440; *Carrier v. Paper Co.*, 73 Hun, 287; 26 N. Y. Supp. 414; *Spencer v. Spencer*, 95 N. Y. 353; *Carter v. Holahan*, 92 N. Y. 498; *Brown v. Stillman*, 43 Minn. 126; *Nelson v. Rogers*, 47 Minn. 103; *Jefferson v. Asch*, 53 Minn. 446, 39 Am. St. Rep. 618; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Arnaud v. Grigg*, 29 N. J. Eq. 482; *Norwood v. De Hart*, 30 N. J. Eq. 412; *Mellen v. Whipple*, 1 Gray, 317; *Osborne v. Cabell*, 77 Va. 462; *Keller v. Ashford*, 133 U. S. 610; *Morris v. Mix*, 4 Kan. App. 654; *New England Trust Co. v. Nash*, 5 Kan. App. 739; *Ward v. De Oca*, 120 Cal. 102; *Hicks v. Hamilton*, 144 Mo. 495, 66 Am. St. Rep. 431.

Where the grantor is in equity bound to pay the debt as his own, the covenant of his grantee to discharge the ¹¹² obligation constitutes a promise made for the benefit of the holder of the mortgage, which he may enforce, although the primary object of the grantor in exacting the covenant was to protect himself against his personal liability for the debt, which was a charge upon the mortgaged premises: *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327; *Pardee v. Treat*, 82 N. Y. 385; *Biddel v. Brizzolara*, 64 Cal. 354; *Williams v. Naftzger*, 103 Cal. 438.

In Pennsylvania, however, a different conclusion has been reached by the courts, which hold that a grantor, although not personally liable for the payment of a mortgage debt, may direct how the purchase money shall be paid; and if the grantee

of the premises agrees to pay according to such directions, he will be liable on his covenant: *Merriam v. Moore*, 90 Pa. St. 78. The rule adopted in Pennsylvania and some other states seems to be founded on the maxim that "equity regards as done what ought to be done," the application of which treats the land purchased as money, and the grantee having agreed, as a part of the consideration, to pay the debt, is liable on his covenant to the holder of the mortgage for the faithful disposition of the fund which has been placed in his hands by the grantor for the purpose of discharging the encumbrance. If this theory be correct, and the mortgagee has a claim in equity upon the fund, it would seem to follow, from the adoption of the maxim, that a conveyance of the legal title must necessarily discharge the mortgage, and the holder thereof, having lost his lien thereby, is obliged to resort for indemnity to the fund which takes the place of his security. The transfer of the title to the premises, however, does not discharge the mortgage thereon; and the holder of the lien not having parted with his security nor incurred any loss in consequence of the conveyance, it would seem to ¹¹³ follow that he could have no claim whatever against the grantee who had assumed and agreed to pay the mortgage debt. When default is made in the payment of said debt, the encumbrance on the premises remains intact, and this being so, the land was never converted into money, and the theory that the purchase price in the hands of the grantee constitutes a fund for the purpose of discharging the encumbrance is unfounded; thus showing that the maxim involved is inapplicable.

A conveyance of mortgaged land by a grantor who is not personally liable for the payment of the debt thereby secured is not equivalent to remitting money to another with a request that he pay it over to the holder of the mortgage in satisfaction of the encumbrance, in consideration of which the grantee assumes and agrees to pay such debt. The error in the conclusion, by which the grantee under such circumstances is held personally liable on his covenant, seems to lie in the adoption of theory as the major premise, instead of basing the reasoning upon the facts involved. If the grantor, however, is personally liable for the payment of the mortgage debt, it is but reasonable to suppose that when he conveys the premises which are subject to the lien, he would seek indemnity for his own benefit, and insist that the person to whom he sold the land should assume and agree, as a part of the consideration,

to pay the debt which was a charge thereon, and the grantee, having accepted a deed poll containing such a covenant, becomes personally liable for the payment of said debt; but this covenant must necessarily inure to the grantor for whose benefit it was made, rather than to the holder of the mortgage, who has given no consideration whatever for the additional assurance which he thus obtains by reason of the grantee's covenant. In foreclosing the mortgage such grantee is ¹¹⁴ a necessary party in order to bar his equity of redemption, and the court, having obtained jurisdiction of his person, will, in order to avoid a circuity of remedies, enforce his covenant, not for the benefit of the holder of the mortgage, but to protect the grantor from any personal judgment that may be rendered against him: *Osborne v. Cabell*, 77 Va. 462. *Mary C. Hill and H. E. Bristow* not being personally liable for the payment of said debt, were not benefited by Cake's covenant, and if any benefit was intended to be derived therefrom, plaintiff must have been the recipient thereof; but under the recent decisions of this court, which we think are founded in reason and supported by the weight of authority, something more than an intended benefit is required to give force to the implied promise, and as no personal debt was due Cake's grantors, he incurred no personal liability to plaintiff by his covenant, and hence it follows that the decree is affirmed.

MORTGAGES—ASSUMPTION OF DEBT—EFFECT OF.—Unless the grantor is personally liable for a mortgage debt on the premises granted, a grantee who has assumed and agreed to pay such debt, as a part of the consideration, is not personally liable therefor: *Hicks v. Hamilton*, 144 Mo. 495, 68 Am. St. Rep. 431. But see note to *Farmers' Nat. Bank v. Gates*, 72 Am. St. Rep. 726, showing that a grantee, who has assumed the mortgage debt, is liable to the mortgagee therefor, though his grantor was not liable: See, also, the notes to *Pratt v. Conway*, 71 Am. St. Rep. 608; *Baxter v. Camp*, 71 Am. St. Rep. 200.

HUGHES v. LANSING.

[34 OREGON, 118.]

MECHANIC'S LIEN—PRIVILEGE.—The right of a party to assert and perfect a mechanic's lien is a statutory privilege which he may exercise or not, at his pleasure.

MECHANIC'S LIEN—WAIVER OF.—The right to a mechanic's lien may be waived by neglecting to perfect it, and to bring suit thereon within the time prescribed, or by express agreement.

MECHANIC'S LIEN—WAIVER—CONSIDERATION TO SUPPORT—UNILATERAL CONTRACT.—If the owner of a building, relying upon the waiver, by a materialman, of his right to a mechanic's lien, makes a payment to his contractor, which for the present he has a good right to withhold, and the contractor makes a like payment in amount to the materialman, the fact that the materialman secures the benefit of such payment is sufficient consideration to support his waiver, although the consideration was not named in the instrument, where it was well understood that no money would be paid to the contractor at that time, unless the waiver was produced; and the contract, having a consideration, cannot be characterized as a unilateral contract.

MECHANIC'S LIEN.—A WAIVER OF ALL CLAIMS FOR MATERIALS FURNISHED to contractors, and used in the owner's buildings, is equivalent to a waiver of the right to claim a lien therefor against the buildings.

MECHANIC'S LIEN—WAIVER BY AGENT—STATUTE OF FRAUDS.—The right to preserve and perpetuate a mechanic's lien upon buildings is not an interest in land. Hence, a written waiver of a mechanic's lien by an agent, though executed without the formalities required touching instruments affecting land, is a bar to the enforcement of the lien thus waived.

MECHANIC'S LIEN—POWER OF AGENT TO WAIVE.—An agent having authority to represent his principal in the manufacture and sale of lumber, and to file mechanics' liens, is empowered, without any written authority, to waive a mechanic's lien for lumber sold by him for his principal.

MECHANIC'S LIEN—CLAIM FOR—WHEN UNAVAILING—CONFUSION OF ITEMS.—A claim of mechanic's lien for lienable items is unavailing, where it is impossible to segregate such items from nonlienable items set forth in the account in such claim.

MECHANIC'S LIEN—WAIVER OF—PLEADING.—It is proper to plead a waiver of a mechanic's lien, as such, instead of setting up the matters and things which gave rise to it by way of estoppel.

Suit by Hughes against Lansing and others. Goodale, a defendant, answered. He set up a mechanic's lien against Lansing. There was a judgment for Lansing and Goodale appealed.

Sherman, Condit & Park, Tilmon Ford, and D. C. Sherman, for the appellant.

Shaw, Hunt & McCulloch, and George G. Bingham, for the respondent.

110 WOLVERTON, C. J. This is a suit to foreclose a mechanic's lien. J. C. Goodale, a party defendant, answered, setting up a lien for lumber and materials furnished Plummer & Ault, which were used in several buildings constructed by them for the defendant E. Y. Lansing, as original contractors. Lansing defends against this claim of lien by alleging, in effect, that Goodale, for a valuable consideration, waived his right thereto. The facts upon which the alleged waiver is based are, in substance, as follows: Goodale was engaged in the manufacture and sale of lumber and J. E. Baker was his agent, empowered to conduct and carry on the business at Salem, Oregon. Baker was authorized to sign checks, receipt for collections, and to act as his agent generally in and about the business, but had no written authority except for signing checks. He had always attended to the necessary steps for perfecting liens, and as such agent sold the lumber ¹²⁰ and materials to Plummer & Ault, stated the account with them, and subsequently signed and verified the claim of lien for record. He admits the signing of the alleged waiver, but explains the manner of its procurement on cross-examination as follows: "I didn't see Mr. Lansing the day that was given—that receipt. In the first place, we gave that receipt to Plummer & Ault for the amount paid. Mr. Pugh wrote out that receipt, and sent it down there, and I supposed it was just a receipt that day until I went out there, and Mr. Lansing said that it was a waiver, and that was the first knowledge I had of what I had signed." The paper referred to is in the following language:

"Salem, Oregon, March 15, 1894.

"Mr. E. Y. Lansing, Salem, Oregon:

"This is to certify that we, the undersigned lumbering company, do and hereby waive all claims for lumber or other materials furnished by us to Plummer & Ault (contractors), used in the construction of the various buildings erected, or being erected, on your premises south of Salem.

"J. C. GOODALE,
"Per Baker."

E. Y. Lansing testified touching the matter as follows: "Well, the way that came was this: These small buildings—this cottage, barn, poultry-house—was done under a verbal contract; and I had no way of protecting myself; and I said, when the payment became due to Plummer & Ault—I think it was five hundred dollars on this building. I said to Plummer—in fact,

all my transactions were with Plummer—I said, ‘I want you to bring’—I wanted to have those bills brought in; and he said, ‘I will go and get your bills, and get you ten thousand dollars more bond, if you want it.’ Mr. Pugh was present. He came back with this receipt: ‘Received payment for all the lumber furnished on the Lansing job.’ Mr. Pugh was there, and I said to him, ‘That seems a very improper way to do’; and he said, ‘I will have a waiver drawn’; and on ¹²¹ his bringing me this waiver, I paid to Plummer & Ault the amount—I think it was five hundred dollars—on the contract.” Goodale’s account with Plummer & Ault shows a credit of five hundred dollars of the same date as the alleged waiver. Pugh was charged, as Lansing’s architect, with the duty of overseeing the work as it progressed, and determining whether it was performed according to contract.

1. Upon this state of the case it is contended, in behalf of Lansing, that Goodale waived his lien upon the buildings erected under contract with Plummer & Ault. That a party may waive his right to a mechanic’s lien upon structures for the building of which his labor or materials have been employed is a matter about which there can be no controversy. The right to assert and perfect the lien given by statute is a privilege (*Brown v. Harper*, 4 Or. 89) which he may exercise or not, at his pleasure.

2. The statute (Hill’s Annotated Laws, sec. 3669) provides that a person furnishing materials, etc., shall have a lien, and sections 3673, 3675, and 3677, the manner of preserving and perpetuating it. Now, while the statute gives the lien in the first instance for a specified time, without the assertion of any formal claim therefor, it is made incumbent upon the lienor, if he intends to preserve his lien, to make a record of such intention, and to bring suit thereon within the time prescribed, and, if he does not observe these regulations, the lien must be deemed to have lapsed. And he may, if he so desire, waive his right or privilege of invoking the protection which the statute has accorded him as well, by direct and positive stipulations.

Whether the paper above set forth constitutes such a waiver on the part of Goodale we shall now inquire. Lansing objected to making a certain payment upon his contract with Plummer & Ault for the construction of ¹²² one of the buildings until their accounts for material were brought in, so that he might protect himself against any claims of lien based thereon.

Among others was the account for lumber with Goodale. It appears that Plummer, of the firm of Plummer & Ault, with the purpose of satisfying Lansing, first obtained from Goodale, through Baker, a receipt showing "payment for all lumber furnished on the Lansing job." To this Lansing made objections as improper, and thereupon Mr. Pugh, the architect, said: "I will have a waiver drawn," and presently returned with the paper in question, and the five hundred dollars was thereupon paid to Plummer & Ault. Upon the same day Plummer & Ault paid Goodale a like amount, which appears credited upon his account with them.

It is objected (1) that the purported waiver is a unilateral undertaking, without a corresponding obligation or promise upon the part of Lansing; that there was no consideration to support it, and for these reasons it is unavailing for the purpose in view in its procurement; and (2) that it is a transaction concerning real property in which the supposed agent, Baker, had no competent authority to bind Goodale, under the statute of frauds.

3. If there was a consideration supporting the alleged waiver, then it is plain, without elucidation, that it cannot be characterized as a unilateral contract or undertaking. Lansing was charged under the statute with the duty of seeing that whatever payments he made to Plummer & Ault before the expiration of thirty days after the completion of the buildings were distributed among the laborers and materialmen according to their several demands; otherwise he would have subjected himself to a second payment of the same installment: Hill's Annotated Laws, secs. 3678, 3679. Being charged with such duty, it was manifestly his right to require Plummer & Ault to ¹²³ bring in the bills that they had contracted on account of the buildings constructed, or in course of construction. First, the receipt of Goodale was produced, which proved unsatisfactory to Lansing, and then came the alleged waiver, and upon the faith of that instrument the five hundred dollars was paid to Plummer & Ault, and a like amount was paid by them to Goodale. Goodale undoubtedly understood, through Baker, that no money would be paid to Plummer & Ault by Lansing until the waiver was produced; else why should he first give a receipt showing "payment for all lumber furnished on the Lansing job," and when that proved unsatisfactory execute the alleged waiver? We think the payment of the five hundred dollars to Plummer & Ault, under the conditions then

present, and the fact that Goodale secured the benefit of such payment, was ample and sufficient consideration to support the waiver upon the part of Goodale. The writing was directed to Lansing, and although the consideration was not named in the instrument, yet it was well understood that it was given upon condition that Lansing would part with the five hundred dollars, which he had good right to withhold for the present, and this undoubtedly constitutes a valuable consideration, and more especially as Goodale secured the benefit of the payment or its equivalent. It was as though Goodale had requested the payment to be made to Plummer & Ault upon the condition of his relinquishment of his right to claim a lien for the lumber sold to them, and an acceptance on the part of Lansing by paying the money: See *Rand v. Grubbs*, 26 Mo. App. 591. This disposes, as we have intimated, of the unilateral feature claimed for the undertaking.

4. The waiver of all claims for lumber or materials furnished Plummer & Ault and used in Lansing's buildings is equivalent to the waiver of the right or privilege of claiming a lien therefor; for if Goodale has no claim ¹²⁴ for lumber or material sold to Plummer & Ault and used in the buildings, he can have no right to file or claim a lien thereon, based upon his account with them.

5. As it concerns the second ground of objection, it is clear that the mere right or privilege of preserving and perpetuating a mechanic's lien upon buildings is not an interest in land. The right may be allowed to lapse, or its duration may be terminated by a payment of the demand without a release; and a written waiver without the observance of any of the formalities of acknowledgment, etc., required touching instruments affecting land will constitute an insuperable barrier to the enforcement of a lien thus waived, so that the essential characteristics attending instruments affecting real property are especially wanting, as it concerns the requisites of a valid waiver of the lienor's right or privilege. The identical question has been so decided in *Burns v. Carlson*, 53 Minn. 70.

6. Mr. Baker, as the agent of Goodale, executed and filed the necessary claim to perpetuate the very lien the foreclosure of which Goodale is now insisting upon, and it appears that Baker had authority to this purpose, and to do and transact generally the business of Goodale in the manufacture and sale of lumber at Salem, Oregon. If he had such authority, it is clear that he was empowered, without any written authority

thereto, to waive the right to said lien as he undertook to, and did do, in the present instance.

7. It is claimed that some of the lumber obtained and used by Plummer & Ault in Lansing's building was furnished after the waiver, and that the lien for the price thereof could not be affected thereby. But however that may be, it is utterly impossible to segregate the lienable items, if such they be, from the nonlienable items in the account set forth in the claim of lien, which ¹²⁵ is therefore unavailing for the purposes intended: *Williams v. Toledo Coal Co.*, 25 Or. 426, 43 Am. St. Rep. 799.

8. The instrument in question, being founded upon a valuable consideration, constituted, as we have seen, a waiver on the part of Goodale of his right or privilege to claim or assert his lien against the buildings constructed by Plummer & Ault for Lansing, and it was therefore proper for Lansing to plead it as such, instead of setting up the matters and things which gave rise to it by way of estoppel: 28 Am. & Eng. Ency. of Law, 534. Other questions were presented, but the conclusions here reached render their consideration unnecessary. The decree of the court below will be affirmed.

MECHANIC'S LIEN.—THE WAIVER of a mechanic's lien may be inferred from circumstances: *Kirkwood v. Hoxie*, 95 Mich. 62, 35 Am. St. Rep. 549. It must arise from the consent of the mechanic, express or implied, or else from such a line of conduct as has estopped him from asserting it: See monographic note to *Goble v. Gale*, 41 Am. Dec. 221, on the waiver of a mechanic's lien. To preserve a mechanic's lien, it must be filed within the time prescribed: *Ramsey's Appeal*, 2 Watts, 228, 27 Am. Dec. 301. If a contractor covenants with an owner not to file a lien, or not to permit one to be filed by others, neither he nor any subcontractor under him is entitled to a lien: Note to *Waters v. Wolf*, 42 Am. St. Rep. 832.

MECHANIC'S LIEN—EFFECT OF INCLUDING NONLIENABLE ITEMS.—A claim for a mechanic's lien, which includes items for which no lien can be allowed, is insufficient to support the lien: Note to *Peatman v. Centerville Light etc. Co.*, 67 Am. St. Rep. 282.

AGENCY.—A PRINCIPAL IS BOUND by all acts of the agent within the scope of his authority: *Busch v. Wilcox*, 82 Mich. 336, 21 Am. St. Rep. 563.

MAST v. KERN.

[34 OREGON, 247.]

MASTER AND SERVANT—INJURY BY ONE EMPLOYÉ TO ANOTHER.—A MASTER'S LIABILITY for an injury to a servant, caused by the negligence of another employé, depends upon the character of the act causing the injury, and not upon the grade or rank of the negligent employé.

MASTER AND SERVANT—INJURY BY ONE EMPLOYÉ TO ANOTHER—MASTER'S LIABILITY.—If an injury is caused to a servant by another employé, and the act causing the injury was one pertaining to the duty which the master owed to his servant, the master is answerable for the manner of its performance, without regard to the rank of the servant or employé to whom it was intrusted; but, if it was one pertaining only to the duty of an operative, the employé performing it, whatever his rank, was simply a fellow-servant with his colaborers, for whose negligence the master is not answerable.

MASTER AND SERVANT—FELLOW-SERVANTS—WHO ARE—NONLIABILITY OF MASTER.—A master, having men employed in blasting rock, in a stone quarry, is not answerable for the act of the superintendent in directing one of the men to load a hole drilled in the rock, after giant powder has been exploded therein to dry it, even where he was empowered to hire and discharge employés and was negligent in giving such direction without waiting a sufficient time for the hole to cool, which resulted in an explosion, and an injury to the man loading the hole, for he was simply a fellow-servant, not then engaged in the discharge of any duty which the master owed to the injured employé.

Action by Mast against Kern to recover damages for personal injuries. Mast had been blasting rock for Kern in a stone quarry. He worked under the direction of one West, who had charge of the work, with power to hire and discharge men. A hole had been drilled in the rock preparatory to putting in a blast, but, before loading it, West dropped therein two or three sticks of giant powder and caused them to be exploded for the purpose of drying it out. Some powder was then poured into the hole and, as it did not take fire, Mast was directed by West to put in the black powder. While doing this, an explosion occurred, injuring the plaintiff. A recovery was sought on the ground that West was negligent in not waiting a sufficient length of time for the hole to cool after the giant powder had been exploded therein, and in not ascertaining whether there was any fire in the hole before directing the plaintiff to put in the black powder. The plaintiff was nonsuited and appealed.

Watson, Beekman & Watson, D. L. Watson, D. L. Watson, Jr., and Edward Byars Watson, for the appellant.

J. W. Bennett and Dolph, Mallory & Simon, for the respondent.

²⁴⁹ BEAN, J. The motion for nonsuit was, it is stated in the briefs, allowed on the ground that when the plaintiff, with full knowledge of the situation, without protest or objection, undertook to load the hole as directed by West, he knowingly and voluntarily assumed the risks of a premature explosion; and we are not prepared to say at this time that the court was in error in so ruling: *Brown v. Oregon Lumber Co.*, 24 Or. 315. But, however that may be, the judgment of nonsuit must be sustained for the reason that the negligence of West, if any, was, under the circumstances, the negligence of a coservant, for which the defendant is not liable. It is familiar law that a servant assumes, as one of the incidents of his employment, all risks of injury from the negligence of a fellow-servant, because the master cannot, by the exercise of the utmost care and caution, guard against such negligence. But the courts differ somewhat as to who is a fellow-servant, within the meaning of this rule. There are practically two lines of decisions upon the question. On the one hand it is held, adopting the superior servant criterion, that when the master has given to an employé supervisory control and management of his business, or some particular department thereof, such person, while so acting, stands in the place of the master, as to those under his direction and supervision, and for his negligence the master is liable. This is known in the books as the "Ohio doctrine," and was adopted in effect by the supreme court of the United States in *Chicago etc. Ry. Co. v. Ross*, 112 U. S. 377; but that case has been very much modified, if not in effect practically overruled, by the subsequent case of *Baltimore R. R. Co. v. Baugh*, 149 U. S. ²⁵⁰ 368. Under this rule the liability of the master is made to depend upon the rank or grade of the person whose negligence caused the injury. On the other hand, the rule, and the one now unquestionably established and supported by the great weight of authority, both in this country and in England, is that the liability of the master depends upon the character of the act in the performance of which the injury arises, and not the grade or rank of the negligent employé. If the act is one pertaining to the duty the master owes to his servant, he is responsible for the manner of its performance, without regard to the rank of the servant or employé to whom it is intrusted; but, if it is one pertaining only

to the duty of an operative, the employé performing it is a fellow-servant with his collaborators, whatever his rank, for whose negligence the master is not liable: McKinney on Fellow-servants, sec. 43 et seq.; Bailey on Master's Liability, 226 et seq.; Wood on Master and Servant, sec. 438; 24 Am. Law Rev. 175; 25 Am. Law Reg. 481; Crispin v. Babbitt, 81 N. Y. 516, 37 Am. Rep. 521; McCosker v. Long Island R. R. Co., 84 N. Y. 77; Hussey v. Cogger, 112 N. Y. 614, 8 Am. St. Rep. 787; Brown v. Winona etc. R. R. Co., 27 Minn. 162, 38 Am. Rep. 285; Ell v. Northern Pac. R. R. Co., 1 N. Dak. 336, 26 Am. St. Rep. 621; Sayward v. Carlson, 1 Wash. 29. Many other authorities could be cited to the same effect, but these are sufficient to show the irresistible current of the decisions, as well as the ground upon which the doctrine rests, and its application to given facts.

And so is the logical result of the former decisions of this court, as the liability of the master for an injury to a servant, caused by the negligence of another employé, has always been made to depend upon the character of ²⁵¹ the act causing the injury, rather than the grade or rank of the offending employé: Anderson v. Bennett, 16 Or. 515, 8 Am. St. Rep. 311; Hartvig v. Northern Pac. Lumber Co., 19 Or. 522; Miller v. Southern Pac. Co., 20 Or. 285; Carlson v. Oregon Short Line Ry. Co., 21 Or. 450; Fisher v. Oregon Short Line Ry. Co., 22 Or. 533. It is the personal and absolute duty of the master to exercise reasonable care and caution to provide his servants with a reasonably safe place to work, reasonably safe tools, appliances, and instruments to work with, reasonably safe material to work upon, suitable and competent fellow-servants to work with them, and to make needful rules and regulations for the safe conduct of the work; and he cannot delegate this duty to a servant of any grade so as to exempt himself from liability to a servant who has been injured by its nonperformance. Whoever he intrusts with its performance, whatever his grade or rank, stands in place of the master, and he is liable for the negligence of such employé to the same extent as if he had himself performed the act, or been guilty of the negligence. But when the master has performed his duty in this regard, and provided competent employés, a reasonably safe place to work, suitable materials, tools, and appliances to work with, and needful rules and regulations, and the like, he has discharged his whole duty in the premises, and is not liable to a servant for the negligence of another servant while engaged as an operative. It is true that from this doctrine results the conclusion

that an employé may in certain cases occupy a dual position to his fellow workmen. He may be a vice-principal or the representative of the master as to all matters where he is intrusted with the discharge of duties which the master himself is required to perform, ²⁵² and a coservant in the discharge of duties not personal to the master. But this conclusion is a logical one, and has been recognized and applied under many varieties of facts: See McKinney on Fellow-servants, note to sec. 42.

The true test in all cases by which it may be determined whether the negligent act causing the injury is chargeable to the master, or is the act of a coservant, is, Was the offending employé in the performance of the master's duty, or charged therewith, in reference to the particular act causing the injury? If he was, his negligence is that of the master, and the liability follows; if not, he was a mere coservant, engaged in a common employment with the injured servant, without reference to his grade or rank, or his right to employ or discharge men, or to his control over them. In short, the master is liable for the negligence of an employé who represents him in the discharge of his personal duties toward his servants. Beyond this he is liable only for his own personal negligence. "This," as said by Judge Dillon, "is a plain, sound, safe, and practical line of distinction. We know where to find it, and how to define it. It begins and ends with the personal duties of the master. Any attempt to refine based upon the notion of 'grades' in the service, or, what is much the same thing, distinct 'departments' in the service (which departments frequently exist only in the imagination of the judges, and not in fact), will only breed the confusion of the Ohio and Kentucky experiments, whose courts have constructed a labyrinth in which the judges who made it seem to be able to 'find no end in wandering mazes lost'": 24 Am. Law Rev. 189. Now, under this rule, it is clear that defendant is not liable for the act of West in directing the plaintiff to load the hole, even if it was neglect; for he was not then engaged in the discharge of any duty which the master owed to the plaintiff, but ²⁵³ was a fellow-servant, the risk of whose negligence was assumed by the plaintiff when he entered upon the employment. There is no pretense that West was not a fit and competent person to have charge of the work, or that the master was negligent in employing him, but the sole ground of liability alleged is the negligence of West in a matter not pertaining to any duty

the defendant owed to the plaintiff. It follows from these views that the judgment of the court below must be affirmed, and it is so ordered.

Who is a Vice-principal.

Fellow-servant Rule.—About sixty years ago, there was ingrafted into the law of this country what is known as the fellow-servant rule, namely, that a master is not liable for the negligence of a fellow-servant, engaged in the same general employment, where he has used due diligence in the selection of such fellow-servant, and has furnished to his employé suitable means for carrying on the business in which they are engaged: *Farwell v. Boston etc. R. R. Corp.*, 4 Met. 49, 38 Am. Dec. 339; *Murray v. South Carolina R. R. Co.*, 1 McMull. 385, 36 Am. Dec. 268. This rule seems to have been first asserted in *Priestley v. Fowler*, 3 Mees. & W. 1, and is probably the prevailing law in this country at the present time, with some modifications. But it does not apply to the question as to who is a vice-principal, although it is very closely connected with it. The well-understood bedrock principle of the fellow-servant doctrine is, that every employé assumes the risk of his coemployé's negligence as one of the ordinary risks of his work; and many courts have held that the fellow-servant rule is not confined to the case of two servants working in company, or having opportunity to control or influence the conduct of each other, but extends to every case in which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty: *Holden v. Fitchburg R. R. Co.*, 129 Mass. 268, 37 Am. Rep. 343; *Lewis v. Seifert*, 116 Pa. St. 628, 2 Am. St. Rep. 631; *McMaster v. Illinois Cent. R. R. Co.*, 65 Miss. 264, 7 Am. St. Rep. 653; *Louisville etc. Ry. Co. v. Petty*, 67 Miss. 255, 19 Am. St. Rep. 304; *Moody v. Hamilton Mfg. Co.*, 150 Mass. 70, 38 Am. St. Rep. 396; *Blake v. Maine Cent. R. R. Co.*, 70 Me. 60, 35 Am. Rep. 297; *Brown v. Winona etc. R. R. Co.*, 27 Minn. 162, 38 Am. Rep. 285; while other courts have held, as an exception to such rule, that if one servant is injured through the negligent act of his coservant, where the two are in different departments of the same general service, a recovery may be had against the master: *Ryan v. Chicago etc. Ry. Co.*, 60 Ill. 171, 14 Am. Rep. 82. In Kentucky, the liability of a master, in case of a negligent injury by one coservant to another, is dependent upon the grade of the employment. In that state, the master is not liable where the servants are coequals, but he is answerable if they are not of equal grade: *Louisville etc. R. R. Co. v. Brooks*, 83 Ky. 129, 4 Am. St. Rep. 135; *Louisville etc. R. R. Co. v. Cavena*, 9 Bush, 559. Compare *Louisville etc. R. R. Co. v. Collins*, 2 Duvall, 114, 87 Am. Dec. 486. The "superior" servant doctrine also prevails in Ohio: *Berea Stone Co. v. Kraft*, 31 Ohio St. 287, 27 Am. Rep. 511; *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 416; but this rule does not affect a master's liability for the act of an

agent, appointed to perform some duty of the master, although such agent, when appointed, is a coservant with other employes.

The later current of judicial decision, as well as of legislative action, indicates a marked departure from the general rule that all servants employed by the same master, and working under the same control and in a common employment, are fellow-servants, and a disposition is manifested to so limit and restrict the rule as shall impose upon the master a just share of responsibility to his servant for injuries sustained in his employment: *Anderson v. Bennett*, 16 Or. 515, 8 Am. St. Rep. 311; *Smith v. Wabash etc. Ry. Co.*, 92 Mo. 359, 1 Am. St. Rep. 729; *Palmer v. Michigan Cent. R. R. Co.*, 93 Mich. 363, 32 Am. St. Rep. 507; *Murray v. St. Louis etc. Ry. Co.*, 98 Mo. 573; 14 Am. St. Rep. 661; *Darrigan v. New York etc. R. R. Co.*, 52 Conn. 590, 52 Am. Rep. 590. In fact, the question as to who is a vice-principal is a separate and distinct matter from the question as to who is a fellow-servant: *Malone v. Hathaway*, 64 N. Y. 5, 9, 21 Am. Rep. 573. A vice-principal represents the master, and a fellow-servant does not. Hence, in determining who is a vice-principal, the question is whether the person whose status is in controversy has been intrusted with, and authorized to perform, any duty required of the master. The master's liability, in cases of vice-principalship, does not depend upon who performs the duty, but upon the existence of the duty itself, for there are certain duties of the master, as we shall see further on, which he cannot delegate to another, even though a fellow-servant, and absolve himself from liability for their nonperformance: *Pullman Palace Car Co. v. Laack*, 143 Ill. 242. The fellow-servant rule does not relieve a master from his duty toward employes, whether the master is a natural person or a corporation: *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409, 19 Am. St. Rep. 180; and it is clear that the master's negligence, in performing his duties, is not one of the risks assumed by a servant in entering upon, or continuing in, his employment: *Taylor v. Evansville etc. R. R. Co.*, 121 Ind. 124, 16 Am. St. Rep. 372; whether such negligence is committed by the master in person or by an agent authorized by him to perform a duty resting upon the master: *Dobbin v. Richmond etc. R. R. Co.*, 81 N. O. 446, 31 Am. Rep. 512; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242. A servant assumes the natural risks of his employment, but not those which the wrongful act of the employer has added: *Davis v. Central etc. R. R. Co.*, 55 Vt. 84, 45 Am. Rep. 590; and no reason is perceived why the existence of the rule as to fellow-servants, in any particular jurisdiction, should interfere with the application of the rule as to vice-principals, though it must be confessed that the confounding of two distinct rules of law, namely, the one which requires the master to use due care in furnishing the instrumentalities with which the servant is to do his work, and which is personal to the master, rendering him answerable for a failure in that respect, and the other that a master is not answerable to his servant for the negligence

of his fellow-servant in the same common employment, has caused many incongruous decisions among the hundreds of cases on the subject which have, of recent years, found their way into the courts of last resort; and to keep separate these two distinct rules of law, in the labyrinth of inconsistencies into which they have been thrown, is a perplexing and tangled task. The better reasoned authorities, however, make the distinction to which we have adverted, and serve to simplify the law on this vexed question. The rule that a master is not answerable to one servant for an injury caused by the negligence of a fellow-servant applies to those cases only where the injury complained of happens without the fault of the master, either in the act which caused the injury or in the employment of the person who caused it. It does not apply when the master is at fault. In other words, the fellow-servant rule does not apply to a case in which one servant is negligently injured by another, where the offending servant is a vice-principal or direct representative of the master: *Chicago etc. R. R. Co. v. Swett*, 45 Ill. 197, 92 Am. Dec. 206; *Keegan v. Western R. R. Corp.*, 8 N. Y. 175, 59 Am. Dec. 476; *Chicago etc. R. R. Co. v. McLallen*, 84 Ill. 109; *Faren v. Sellers*, 39 La. Ann. 1011, 4 Am. St. Rep. 256; *Gormly v. Vulcan Iron Works*, 61 Mo. 492.

Definitions and General Principles.—Whenever a master delegates to any officer, servant, agent, or employé, high or low, the performance of any duty which really devolves upon the master himself, then such officer, servant, agent, or employé stands in the place of the master and becomes a substitute for the master, or, in other words, a vice-principal, and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence: *Atchison etc. R. R. Co. v. Moore*, 29 Kan. 632, 644; *Hannibal etc. R. R. Co. v. Fox*, 31 Kan. 586. It is held, in some jurisdictions, that a person employed by a master and given power to superintend, control, and direct other employés engaged in the performance of certain work for the master is, as to the men under him, a vice-principal, no matter what he is called, or what his grade of service may be, and that the master is liable for his negligent acts and omissions in performing his duties: *Miller v. Missouri Pac. Ry. Co.*, 109 Mo. 350, 32 Am. St. Rep. 673; *Bloyd v. St. Louis etc. Ry. Co.*, 58 Ark. 66, 41 Am. St. Rep. 85; *Taylor v. Georgia Marble Co.*, 99 Ga. 512, 59 Am. St. Rep. 238; *Stephens v. Hannibal etc. Ry. Co.*, 86 Mo. 221; *Moore v. St. Louis etc. Ry. Co.*, 85 Mo. 588; *Chicago etc. R. R. Co. v. May*, 108 Ill. 288; *International etc. Ry. Co. v. Hinzle*, 82 Tex. 623; *Fraser v. Schroeder*, 163 Ill. 459; *Gravelle v. Minneapolis etc. Ry. Co.*, 10 Fed. Rep. 711, 715; *Union Pac. R. R. Co. v. Doyle*, 50 Neb. 555, 561; *Libby v. Scherman*, 146 Ill. 540, 37 Am. St. Rep. 191. Thus, a superintendent, upon whom is devolved the whole management and control of work, and who is authorized to employ and discharge workmen, to regulate and direct the manner of their work, to provide the means and

appliances necessary for its prosecution, and to determine the time and place of its employment, may be regarded as standing in the place of his master, and while in the discharge of his duties as such superintendent, he is not deemed a fellow-servant with the other employes of his master who are under his control: *Hussey v. Coger*, 112 N. Y. 614, 8 Am. St. Rep. 787. So, one who has charge of other servants, and has authority to govern and direct their movements in the branch of the principal's business in which they are engaged is, while acting in pursuance of and within the scope of such authority, the vice-principal, so as to make his acts and directions the acts and directions of the principal: *Libby v. Scherman*, 146 Ill. 540, 37 Am. St. Rep. 191. One authorized by a master to employ and discharge men, in doing work for the master, is also held by some courts to be a vice-principal, and his negligence to be that of the master: *Nix v. Texas etc. Ry. Co.*, 82 Tex. 473, 27 Am. St. Rep. 897; *Missouri Pac. Ry. Co. v. Williams*, 75 Tex. 4, 16 Am. St. Rep. 867; *Texas etc. Ry. Co. v. Reed*, 88 Tex. 439, 446. In North Carolina, it has been said that the test of the question whether one in charge of other servants is to be regarded as a fellow-servant, or as a middleman or vice-principal, is involved in the inquiry whether those who act under his orders have just reason for believing that the failure or refusal to obey the superior will, or may, be followed by a discharge from the service in which they are engaged: *Turner v. Goldsboro Lumber Co.*, 119 N. C. 387, 396.

The prevailing opinion seems to be that mere authority does not make one a vice-principal so as to charge the master with his negligence; and that the power of a person to employ and discharge men, in his master's service, is a matter properly to be considered in determining whether such person is a vice-principal; but that such power is not conclusive as to the question of vice-principalship: *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409, 19 Am. St. Rep. 180; *Newbury v. Getchel etc. Mfg. Co.*, 100 Iowa, 441, 62 Am. St. Rep. 582; *Union Pac. R. R. Co. v. Doyle*, 50 Neb. 555; *Hathaway v. Illinois Cent. Ry. Co.*, 92 Iowa, 337, 342; *New Pittsburgh etc. Coke Co. v. Peterson*, 136 Ind. 398, 43 Am. St. Rep. 327; *Palmer v. Michigan Cent. R. R. Co.*, 98 Mich. 363, 32 Am. St. Rep. 507; *Peterson v. Whitebreast etc. Min. Co.*, 50 Iowa, 673, 32 Am. Rep. 143; *Malone v. Hathaway*, 64 N. Y. 5, 21 Am. Rep. 573; *Chicago etc. R. R. Co. v. May*, 108 Ill. 288; *Webb v. Richmond etc. R. R. Co.*, 97 N. C. 387. Nor does it follow that one employe is not a vice-principal as to his coemployes because he is not vested with the authority to hire and discharge them: *Union Pac. Ry. Co. v. Doyle*, 50 Neb. 555. Whether such employe has, or has not, authority to employ and discharge the coemployes under him is sometimes immaterial in determining whether or not he is a vice-principal: *Alaska Min. Co. v. Whelan*, 168 U. S. 86.

The true and decisive test of a vice-principal is not the relation of the employes as to each other, but the character of the act done or services performed. In other words, it is the nature of the duty

intrusted to the employé, or the capacity in which he acted while doing the particular act complained of. It is not a question of grade or rank, and the employé's place or grade of service is not material. When a servant is intrusted with some duty of the master, which the latter owes to another servant, and which cannot, therefore, be delegated by the master, and the duty is not performed, or is negligently performed, the negligent servant is a vice-principal, for he must be regarded as the agent or representative of his employer. Hence, the question, according to what we conceive to be the sounder principle, as to whether an employé is a vice-principal, must be determined by ascertaining whether the act performed or duty omitted is one the doing of which is charged upon the master, and whether it has been delegated by him to the servant. If it is such an act or duty, and has been so delegated, the servant to whom such delegation has been made is a vice-principal, although he is a coemployé with other servants; and the master is answerable for injury which results from his negligent acts or omissions, where the injured servant has not been negligent and has not assumed the risk: *Norfolk etc. R. R. Co. v. Houchins*, 95 Va. 398, 64 Am. St. Rep. 791; *Newbury v. Getchel etc. Mfg. Co.*, 100 Iowa, 441, 62 Am. St. Rep. 582; *New Pittsburgh etc. Coke Co. v. Peterson*, 136 Ind. 398, 43 Am. St. Rep. 327; *Hankins v. New York etc. R. R. Co.*, 142 N. Y. 416, 40 Am. St. Rep. 616; *Jenkins v. Richmond etc. R. R. Co.*, 39 S. C. 507, 39 Am. St. Rep. 750; *Elledge v. National City etc. Ry. Co.*, 100 Cal. 282, 38 Am. St. Rep. 290; *Daves v. Southern Pac. Co.*, 98 Cal. 19, 35 Am. St. Rep. 133; *Dwyer v. American Exp. Co.*, 82 Wis. 807, 33 Am. St. Rep. 44; *Miller v. Missouri Pac. Ry. Co.*, 109 Mo. 350, 32 Am. St. Rep. 673; *Daniel v. Chesapeake etc. Ry. Co.*, 36 W. Va. 397, 32 Am. St. Rep. 870; *Orman v. Mannix*, 17 Colo. 564, 31 Am. St. Rep. 340; *Colorado etc. Ry. Co. v. Naylor*, 17 Colo. 501, 31 Am. St. Rep. 335; *Sweeney v. Gulf etc. Ry. Co.*, 84 Tex. 433, 31 Am. St. Rep. 71; *McElligott v. Randolph*, 61 Conn. 157, 29 Am. St. Rep. 181; *Ell v. Northern Pac. Ry. Co.*, 1 N. Dak. 336, 26 Am. St. Rep. 621; *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409, 19 Am. St. Rep. 180; *Galveston etc. Ry. Co. v. Smith*, 76 Tex. 611, 18 Am. St. Rep. 78; *Lewis v. Selfert*, 116 Pa. St. 628, 2 Am. St. Rep. 631; *Oalvo v. Charlotte*, 23 S. C. 526, 55 Am. Rep. 28; *Davis v. Central Vt. R. R. Co.*, 53 Vt. 84, 45 Am. Rep. 590; *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 262, 44 Am. Rep. 573; *Malone v. Hathaway*, 64 N. Y. 5, 21 Am. Rep. 573; *Flike v. Boston etc. R. R. Co.*, 53 N. Y. 549, 13 Am. Rep. 645; *Baltimore etc. R. R. Co. v. Baugh*, 149 U. S. 368, 387; *Northern Pac. R. R. Co. v. Peterson*, 162 U. S. 346, 352; *Zintek v. Stimson Mill Co.*, 6 Wash. 178; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; *Atchison etc. R. R. Co. v. Moore*, 29 Kan. 632; *Lindvall v. Woods*, 41 Minn. 212; *Carlson v. Northwestern etc. Co.*, 63 Minn. 428; *Lundberg v. Shevlin-Carpenter Co.*, 68 Minn. 135; *Quinn v. New Jersey etc. Co.*, 23 Fed. Rep. 363, 365; *Northern Pac. R. R. Co. v. Peterson*, 51

Fed. Rep. 182, 187; *Stockmeyer v. Reed*, 55 Fed. Rep. 259, 262; *Jackson v. Norfolk etc. R. R. Co.*, 43 W. Va. 380; *Robertson v. Chicago etc. R. R. Co.*, 146 Ind. 486; *Justice v. Pennsylvania Co.*, 130 Ind. 321; *Nall v. Louisville etc. Ry. Co.*, 129 Ind. 260; *Mobile Ry. Co. v. Smith*, 59 Ala. 245; extended note to *Fox v. Sandford*, 67 Am. Dec. 590. It is said in *Carlson v. Northwestern etc. Co.*, 63 Minn. 428, 432, that "the authorities upon the question when and under what circumstances an employé becomes, as to his fellow-servants in a common employment, the representative of the master, are involved in a bewildering maze of inconsistency and injustice"; but in *Kerner v. Baltimore etc. Ry. Co.*, 149 Ind. 21, 24, it is said that "there is no room for confusion as to when one is a vice-principal, and when a fellow-servant. It is not determined by rank in the service or title by which he is known, but it depends upon the particular service in which he is at the time engaged. If that service is in supplying instrumentalities of the service, or the place to perform the service—in short, if he is performing a duty owing by the master to the injured servant, by authority of the master, and does it negligently, or if he negligently omits a duty of the master which he is delegated to perform—his negligence is that of the master. But, if he is engaged with the servant injured in the common service of the master, not involving some duty of the master, he is a fellow-servant."

In applying the doctrine that the character of the act, in the performance of which an injury arises to a coemployé, determines whether the offending servant is a vice-principal or not, it will be found that the offending employé may, in certain cases, occupy a dual position as to his fellow-workmen. He may be a vice-principal or the representative of the master as to all matters where he is intrusted with the discharge of duties which the master himself is required to perform, and a coservant in the discharge of duties not personal to the master: *Hussey v. Oger*, 112 N. Y. 614, 8 Am. St. Rep. 787; *National Fertilizer Co. v. Travis*, 102 Tenn. 16; *Texas etc. Ry. Co. v. Reed*, 88 Tex. 439, 445; *Ell v. Northern Pac. R. R. Co.*, 1 N. Dak. 336, 26 Am. St. Rep. 621; *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521; *Lindvall v. Woods*, 41 Minn. 213; *Jackson v. Norfolk etc. R. R. Co.*, 43 W. Va. 380; *Justice v. Pennsylvania Co.*, 130 Ind. 321; *Brunell v. Southern Pac. Co.*, 34 Or. 256, 259; *Stockmeyer v. Reed*, 55 Fed. Rep. 259; *Reed v. Stockmeyer*, 74 Fed. Rep. 186; *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409, 19 Am. St. Rep. 180; *Theleman v. Moeller*, 73 Iowa, 108, 5 Am. St. Rep. 663; *Railway Co. v. Torrey*, 58 Ark. 217. Thus, a servant or agent of a railway company may be charged with a duty, such as keeping a safe track and furnishing safe machinery, from which his master cannot absolve himself by imposing it upon a mere servant. If the neglect of such a duty results in injury to a coemployé, the master is answerable; but, on the other hand, such servant or agent may have other duties to perform, not of the character named, in the performance

of which he stands toward his coemployés merely as a fellow-servant. For the neglect of such duties the latter cannot recover: *Texas etc. Ry. Co. v. Reed*, 88 Tex. 439, 445. So, while an engineer may be, in operating his engine, a fellow-servant of another employé who adjusts the belts, yet he is a vice-principal to the same employé with respect to the safety and repair of the signal appliances intended for the latter's protection: *National Fertilizer Co. v. Travis*, 102 Tenn. 16. And, while a section foreman and his subordinates generally occupy the position of vice-principal and servants as to each other, yet such foreman may become the fellow-servant of his subordinates during the performance of work properly that of a fellow-servant, as by handling the brake on a hand-car used by the section gang. While engaged in such work the principal is not liable for injuries resulting to a member of the section gang from the foreman's negligence: *Gann v. Railroad*, 101 Tenn. 380, 70 Am. St. Rep. 687. An agent of high rank may be, at the time an act is done, a fellow-servant of an employé occupying a subordinate position: *Hussey v. Coger*, 112 N. Y. 614, 8 Am. St. Rep. 787; and the fact that a railroad engineer occupies, as to some matters, the position of a vice-principal does not affect the question as to whether he is a fellow-servant in other matters: *National Fertilizer Co. v. Travis*, 102 Tenn. 16. One performing, with coemployés, a servant's work is a fellow-servant at the time, though he has been intrusted with higher duties: *Brick v. Rochester etc. R. R. Co.*, 98 N. Y. 211, 216. It does not follow, because a master of machinery acts in a distinct and special employment in making the selection of an engine, that he is not a fellow-servant with those operating it, in his ordinary employment as master of machinery: *Cumberland etc. R. R. Co. v. State*, 44 Md. 283, 294. If the foreman and vice-principal of an electric railroad company performs the duties of a common laborer, by acting himself as motorman in bringing in cars upon a repair track to be cleaned, repaired, and inspected, he acts in a double capacity, but the company is answerable for his negligence, if any, because it arises in the exercise of duties devolving upon him in his capacity as vice-principal, with respect to the placing, cleaning, repairing, and inspection of cars: *Metropolitan etc. R. R. Co. v. Skola*, 183 Ill. 454, 457, ante, p. 120; and the foreman of a department, who takes part in the performance of labor with his men, is a fellow-servant, as to acts which it is not the duty of the master to perform: *Findlay v. Russell etc. Foundry Co.*, 108 Mich. 286, 290. But, where a servant is injured, the fact that the vice-principal is temporarily working with other employés as a co-employé, assisting to do what he has ordered to be done, does not make him a fellow-servant with the injured party, so as to relieve the master from liability: *Pittsburgh Bridge Co. v. Walker*, 170 Ill. 550, 554. A master, however, is not answerable, in those states where mere authority makes one a vice-principal, for the negligent acts of a vice-principal which are not the result of any exercise

of his authority as foreman, as in a case where he assists another servant of the master in lifting barrels of salt from a wagon: *Gall v. Beckstein*, 173 Ill. 187. A foreman, superintendent, or superior servant, and an inferior servant, when the two are engaged in the same general work for the master, are fellow-servants. The superior rank of the former cannot lift him above the grade of a fellow-servant into the position of a vice-principal, so long as he is engaged in the work of a servant only. In such a case, the superior servant is no more the representative of the master than the inferior servant, except in the enlarged field of his action, and the wider scope of the trusts confided to him; nor does his rank increase the risks of his employment assumed by the inferior servant: *Ell v. Northern Pac. R. R. Co.*, 1 N. Dak. 336, 26 Am. St. Rep. 621.

A servant, agent, or employé, while performing a duty required of the master, stands in the place of the master and becomes a vice-principal. The master is, therefore, answerable for his negligence: *Newbury v. Getchel etc. Mfg. Co.*, 100 Iowa, 441, 62 Am. St. Rep. 582; *Fink v. Des Moines Ice Co.*, 84 Iowa, 321, 325; *Haworth v. SeEVERS Mfg. Co.*, 87 Iowa, 765; *Doughty v. Penobscot Log etc. Co.*, 76 Me. 143; *Georgia Pac. Ry. Co. v. Davis*, 92 Ala. 300, 25 Am. St. Rep. 47; *Chicago etc. R. R. Co. v. Avery*, 109 Ill. 314. The fact that a servant injured by the negligence of a fellow-servant was a minor does not make the fellow-servant a vice-principal: *Newbury v. Getchel etc. Mfg. Co.*, 100 Iowa, 441, 62 Am. St. Rep. 582. The statute of Texas declares that "all persons engaged in the service of any railway corporation, foreign or domestic, doing business in that state, who are intrusted by such corporation with the authority of superintendence, control, or command of other persons in the employ or service of such corporation, or with the authority to direct any other employé in the performance of any duty of such employé, are vice-principals of such corporation, and are not fellow-servants with such employé": See act of March 10, 1891, Gen. Laws, c. 24, sec. 1, p. 25. Upon a given state of facts the question as to whether one is a vice-principal is one of law for the court: *Yates v. McCullough Iron Co.*, 69 Md. 370; *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417; but it is generally a mixed question of law and fact: *Union Pac. R. R. Co. v. Doyle*, 50 Neb. 555, 557; *Dube v. Lewiston*, 83 Me. 211.

Master's Duties.—As the doctrine of vice-principal begins and ends with the personal duties of the master, it is essential to an understanding of the doctrine to know what those duties are. A master owes to a servant entering his employment the duty of providing him with a reasonably safe place in which to work, having reference to the character of the employment in which the servant is engaged: *Northern Pac. R. R. Co. v. Peterson*, 162 U. S. 346, 353; *McElligott v. Randolph*, 61 Conn. 157, 29 Am. St. Rep. 181; *Flanagan v. Chesapeake etc. Ry. Co.*, 40 W. Va. 436, 52 Am. St. Rep. 896; *Camp v. Hall*, 39 Fla. 535; *Fink v. Des Moines Ice Co.*, 84

Iowa, 321, 325; *Grant v. Varney*, 21 Colo. 329; *Elledge v. National City etc. Ry. Co.*, 100 Cal. 282, 38 Am. St. Rep. 290; *Louisville etc. Ry. Co. v. Graham*, 124 Ind. 89; *Nall v. Louisville etc. Ry. Co.*, 129 Ind. 260; *Pantzar v. Tilly etc. Min. Co.*, 99 N. Y. 368; *Hess v. Rosenthal*, 160 Ill. 621; *Norfolk etc. R. R. Co. v. Houchins*, 95 Va. 398, 64 Am. St. Rep. 791.

He also owes the duty of providing and keeping in proper repair reasonably safe tools, appliances, and machinery for the accomplishment of the work necessary to be done: *Northern Pac. R. R. Co. v. Peterson*, 162 U. S. 346, 353; *Hough v. Railway Co.*, 100 U. S. 218; *Jackson v. Norfolk etc. R. R. Co.*, 43 W. Va. 380, 382; *Flannegan v. Chesapeake etc. Ry. Co.*, 40 W. Va. 436, 52 Am. St. Rep. 896; *Camp v. Hall*, 39 Fla. 535; *Fink v. Des Moines Ice Co.*, 84 Iowa, 321, 325; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Indiana etc. Ry. Co. v. Snyder*, 140 Ind. 647; *Madden v. Chesapeake etc. Ry. Co.*, 28 W. Va. 610, 57 Am. Rep. 695; *Pantzar v. Tilly etc. Min. Co.*, 99 N. Y. 368; *Bushby v. New York etc. R. R. Co.*, 107 N. Y. 374, 1 Am. St. Rep. 844; *Boelter v. Ross Lumber Co.*, 103 Wis. 324; *Ohio etc. Ry. Co. v. Percy*, 128 Ind. 197; *Whalen v. Centenary Church*, 62 Mo. 326; *Parsons v. Missouri Pac. Ry. Co.*, 94 Mo. 286; *Benzing v. Steinway*, 101 N. Y. 547; *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *Norfolk etc. R. R. Co. v. Houchins*, 95 Va. 398, 64 Am. St. Rep. 791; *Richmond etc. R. R. Co. v. Burnett*, 88 Va. 538; *Norfolk etc. R. R. Co. v. Nuckols*, 91 Va. 193; *Norfolk etc. R. R. Co. v. Ampey*, 93 Va. 108; *Cooper v. Pittsburgh etc. R. R. Co.*, 24 W. Va. 37.

He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties: *Northern Pac. R. R. Co. v. Peterson*, 162 U. S. 346, 353; *Jackson v. Norfolk etc. R. R. Co.*, 43 W. Va. 380, 382; *Flannegan v. Chesapeake etc. Ry. Co.*, 40 W. Va. 436, 52 Am. St. Rep. 896; *Madden v. Chesapeake etc. Ry. Co.*, 28 W. Va. 610, 57 Am. Rep. 696; *Pantzar v. Tilly etc. Min. Co.*, 99 N. Y. 368; *Bushby v. New York etc. R. R. Co.*, 107 N. Y. 374, 1 Am. St. Rep. 844; *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *Norfolk etc. R. R. Co. v. Houchins*, 95 Va. 398, 64 Am. St. Rep. 791; *Norfolk etc. R. R. Co. v. Nuckols*, 91 Va. 193; *Norfolk etc. R. R. Co. v. Ampey*, 93 Va. 108; *Harper v. Indianapolis etc. R. R. Co.*, 44 Mo. 488; *Laning v. New York etc. R. R. Co.*, 49 N. Y. 521, 10 Am. Rep. 417; *Flike v. Boston etc. R. R. Co.*, 53 N. Y. 549, 13 Am. Rep. 545; *Tyson v. North and South etc. R. R. Co.*, 61 Ala. 554, 32 Am. Rep. 8; *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409, 19 Am. St. Rep. 180; *Core v. Ohio River R. R. Co.*, 38 W. Va. 456; *Miller v. Southern Pac. Co.*, 20 Or. 285.

And it has been held in some states that the master owes the further duty of adopting and promulgating safe and proper rules, when needed for the conduct of his business, including the care and management of the machinery and the running of trains on a railroad, and, having adopted such rules, to conform to them: *Jackson v. Norfolk etc. R. R. Co.*, 43 W. Va. 382; *Flannegan v. Chesapeake*

etc. Ry. Co., 40 W. Va. 436, 52 Am. St. Rep. 896; Madden v. Chesapeake etc. Ry. Co., 28 W. Va. 610, 57 Am. Rep. 695; Bushby v. New York etc. R. R. Co., 107 N. Y. 374, 1 Am. St. Rep. 844; Norfolk etc. R. R. Co. v. Houchins, 95 Va. 398, 64 Am. St. Rep. 791; Chicago etc. Ry. Co. v. Taylor, 69 Ill. 461, 18 Am. Rep. 626; Harrison v. Detroit etc. R. R. Co., 79 Mich. 409, 19 Am. St. Rep. 180; Miller v. Southern Pac. Co., 20 Or. 285; Schroeder v. Chicago etc. R. R. Co., 108 Mo. 322.

If the master is neglectful in any of these matters, or in any other matter respecting the safety of his employés, it is a neglect of a duty which he personally owes to his employés, and if one of them is injured by reason of such negligence, the master is answerable: Northern Pac. R. R. Co. v. Peterson, 162 U. S. 346, 353; Jackson v. Norfolk etc. R. R. Co., 43 W. Va. 380, 383; Flannegan v. Chesapeake etc. Ry. Co., 40 W. Va. 436, 52 Am. St. Rep. 896; Daniel v. Chesapeake etc. Ry. Co., 36 W. Va. 397, 32 Am. St. Rep. 870; Hess v. Rosenthal, 160 Ill. 621; Harrison v. Detroit etc. R. R. Co., 79 Mich. 409, 19 Am. St. Rep. 180. If the master, however, instead of personally performing these obligations, engages another to do them for him, he is answerable for the neglect of that other, which in such a case is not the neglect of a fellow-servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master, as such, to perform: Northern Pac. R. R. Co. v. Peterson, 162 U. S. 346, 353; Jackson v. Norfolk etc. R. R. Co., 43 W. Va. 380, 383; Flannegan v. Chesapeake etc. Ry. Co., 40 W. Va. 436, 52 Am. St. Rep. 896; Daniel v. Chesapeake etc. Ry. Co., 36 W. Va. 397, 32 Am. St. Rep. 870; Hess v. Rosenthal, 160 Ill. 621; Harrison v. Detroit etc. R. R. Co., 79 Mich. 409, 19 Am. St. Rep. 180.

Expressed in another form, it is the duty of a master to use reasonable care in supplying and maintaining safe and suitable instrumentalities for the performance of the work required of his servants; and the term "instrumentalities" includes not only machinery, premises, and all the implements of every kind, but also the persons employed to operate them and whatever else may be necessary for the safety and protection of the employés: Drymala v. Thompson, 26 Minn. 40; McDermott v. Hannibal etc. R. R. Co., 87 Mo. 285, 297; Pullman Palace Car Co. v. Laack, 143 Ill. 242; Holden v. Fitchburg R. R. Co., 129 Mass. 268, 37 Am. Rep. 843; Fay v. Minneapolis etc. Ry. Co., 30 Minn. 231; Fink v. Des Moines Ice Co., 84 Iowa, 321, 325; Leonard v. Kinnare, 174 Ill. 532.

The master's duty to his employés to provide safe places for them in which to work is a continuing one, and requires him to use ordinary care to keep them safe, and if they become unsafe through his neglect, or are made unsafe through his act, he must answer in damages to a servant who is injured thereby, who is himself free from contributory negligence: Nall v. Louisville etc. Ry. Co.,

129 Ind. 260, 271; Ohio etc. Ry. Co. v. Percy, 128 Ind. 197. And the master's duty to provide reasonably safe and suitable machinery and appliances for his business includes not only the exercise of reasonable care in furnishing such appliances, but also the exercise of like care in keeping the same in repair and making proper inspections and tests: Norfolk etc. R. R. Co. v. Houchins, 95 Va. 398, 407, 64 Am. St. Rep. 791, 799; Boelter v. Ross Lumber Co., 103 Wis. 824; Ohio etc. Ry. Co. v. Percy, 128 Ind. 197. So, the designation of an agent, however fit and competent that agent may be, for the execution of the master's duties, "does not fill out the sum of the master's obligation," nor serve to relieve the master from further liability. Until the agent thus selected and empowered in fact acts up to the limit of the duty of his master to act, the master's duty is not done. The master's duty requires performance, and it must be performed either by the master or his agent: McElligott v. Randolph, 61 Conn. 157, 29 Am. St. Rep. 181. One of the positive duties of a master is to adopt for the protection and safety of his employes, where he is engaged in a complex and dangerous business requiring it, definite rules for their protection, and a failure to do so is such negligence as renders him answerable for all injuries resulting therefrom: Morgan v. Hudson River etc. Iron Co., 183 N. Y. 666; Schroeder v. Chicago etc. R. R. Co., 106 Mo. 322. Thus, a railroad company is liable to its servants for injuries received in consequence of a want of regulations for their guidance in making flying-switches, and in the shunting and kicking of its cars: Reagan v. St. Louis etc. Ry. Co., 98 Mo. 348, 3 Am. St. Rep. 542. The rule providing that a master must supply and maintain safe and suitable instrumentalities for the performance of work demanded of his servants requires a railroad company to keep and maintain a safe roadbed and clear track: Wright v. Southern Ry. Co., 123 N. C. 280; Flannegan v. Chesapeake etc. Ry. Co., 40 W. Va. 436, 52 Am. St. Rep. 896; Norfolk etc. R. R. Co. v. Nuckol, 91 Va. 198; and safe cars: Parsons v. Missouri Pac. Ry. Co., 94 Mo. 286; Miller v. Southern Pac. Co., 20 Or. 285. It must also keep its rolling stock, tools, machinery, and appliances in good and safe condition: Miller v. Southern Pac. Co., 20 Or. 285, 294. It is the general duty of a master, though a positive and absolute one, to provide a safe "plant": Jackson v. Norfolk etc. R. R. Co., 43 W. Va. 380, 382; Madden v. Chesapeake etc. Ry. Co., 28 W. Va. 610, 57 Am. Rep. 695; and to exercise a general supervision of his business: Harrison v. Detroit etc. R. R. Co., 79 Mich. 409, 19 Am. St. Rep. 180.

A master must exercise, in the carrying on of his business, all the watchfulness over his servants, and employ all the safeguards for their protection and safety which a reasonable and considerate prudence may dictate. For any violation of this duty resulting in an injury to a servant, the master is answerable to him, and this is true though the master has deputed to another employe or servant the performance of the neglected duty: Daniel v. Chesapeake

etc. Ry. Co., 86 W. Va. 397, 32 Am. St. Rep. 870; Dayharsh v. Hannibal etc. R. R. Co., 108 Mo. 570, 23 Am. St. Rep. 900; Carlson v. Northwestern etc. Exch. Co., 63 Minn. 428, 434; State v. Page, 66 Me. 418; Palmer v. Michigan Cent. R. R. Co., 87 Mich. 281, 290. It is the master's duty to give direction, either personally or by an agent, to the work which he undertakes and to prescribe a system for conducting it: Schroeder v. Chicago etc. R. R. Co., 108 Mo. 322; Carlson v. Northwestern etc. Exch. Co., 63 Minn. 428. He must also provide that the manner in which the work is being done shall be safe, and in all cases where danger can be readily guarded against the employer is in duty bound to protect the employé at his peril: Palmer v. Michigan Cent. R. R. Co., 87 Mich. 281, 290. It is a master's duty not to expose his servant to unknown dangers, or those not ordinarily incident to his employment: Dayharsh v. Hannibal etc. R. R. Co., 108 Mo. 570, 23 Am. St. Rep. 900; Richmond etc. R. R. Co. v. Burnett, 88 Va. 538. He must use ordinary care and diligence to protect the servant from extraordinary, unreasonable, or unnecessary risks: Carlson v. Northwestern etc. Exch. Co., 63 Minn. 428, 432; State v. Malster, 57 Md. 287, 307; and must take care not to expose him to any risk, by associating him with other servants wanting in ordinary skill and care: Nashville etc. R. R. Co. v. Elliott, 1 Cold. 611, 78 Am. Dec. 506. Particularly is it the master's duty not to expose young and inexperienced servants to injury: Atlas Engine Works v. Randall, 100 Ind. 298, 50 Am. Rep. 798; without instructing and warning them as to special dangers, especially in the use of dangerous machinery: Camp v. Hall, 39 Fla. 535; Ross v. Walker, 139 Pa. St. 42, 23 Am. St. Rep. 160; Newbury v. Getchel etc. Mfg. Co., 100 Iowa, 441, 62 Am. St. Rep. 582; Atlas Engine Works v. Randall, 100 Ind. 298, 50 Am. Rep. 798. In short, the duty rests upon a master, whether a natural person or a corporation, not to expose his servant in the discharge of his duties to perils and dangers against which the master may guard, by the exercise of reasonable care: Pullman Palace Car Co. v. Laack, 143 Ill. 242, 256. As to the master's duty of inspection, see subdivision, "Inspectors and Repairers," *infra*.

The duties of the master above enumerated are those imposed upon him by law. They are positive, absolute, and personal, and the master, whether an individual or a corporation, cannot evade liability by delegating their performance to another. No duty belonging to the master to perform for the safety and protection of his servants can be delegated to any servant of any grade so as to exonerate the master from liability to a servant who has been injured by its nonperformance. The agent to whom such duty has been delegated, whoever he may be, and notwithstanding he may be a fellow-servant in other respects, is a vice-principal or representative of the master. In other words, he is the master's alter ego, whose negligence is that of the master and for which the master is answerable where a third person, whether an employé or a

stranger, is injured thereby: *Pantzar v. Tilly etc. Min. Co.*, 99 N. Y. 363, 372; *Gerrish v. New Haven Ice Co.*, 63 Conn. 9, 17; *Jackson v. Norfolk etc. R. R. Co.*, 43 W. Va. 380, 383; *Drymala v. Thompson*, 26 Minn. 40; *Benzing v. Steinway*, 101 N. Y. 547; *Bushby v. New York etc. R. R. Co.*, 107 N. Y. 374, 1 Am. St. Rep. 844; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Smith v. Chicago etc. Ry. Co.*, 42 Wis. 520, 526; *Miller v. Southern Pac. Co.*, 20 Or. 285; *Ogle v. Jones*, 16 Wash. 319; *Camp v. Hall*, 39 Fla. 535; *Van Dusen v. Letellier*, 73 Mich. 492; *Galveston etc. Ry. Co. v. Farmer*, 73 Tex. 85; *Justice v. Pennsylvania Co.*, 130 Ind. 321; *Hunn v. Michigan Cent. R. R. Co.*, 78 Mich. 513; *Fink v. Des Moines Ice Co.*, 84 Iowa, 321, 325; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; *Brunell v. Southern Pac. Co.*, 84 Or. 256, 259; *Hankins v. New York etc. R. R. Co.*, 142 N. Y. 416, 40 Am. St. Rep. 616; *Flike v. Boston etc. R. R. Co.*, 53 N. Y. 549, 13 Am. Rep. 545; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; *Norfolk etc. R. R. Co. v. Houchins*, 95 Va. 398, 64 Am. St. Rep. 791; *Newbury v. Getchel etc. Mfg. Co.*, 100 Iowa, 441, 62 Am. St. Rep. 582; *Chicago etc. R. R. Co. v. Maroney*, 170 Ill. 520, 62 Am. St. Rep. 396; *Flannegan v. Chesapeake etc. Ry. Co.*, 40 W. Va. 436, 52 Am. St. Rep. 896; *Promer v. Milwaukee etc. Ry. Co.*, 90 Wis. 215, 43 Am. St. Rep. 905; *Colorado etc. Ry. Co. v. Naylor*, 17 Colo. 501, 31 Am. St. Rep. 335; *McElligott v. Randolph*, 61 Conn. 157, 29 Am. St. Rep. 181; *Ell v. Northern Pac. R. R. Co.*, 1 N. Dak. 336, 26 Am. St. Rep. 621; *International etc. Ry. v. Kernan*, 78 Tex. 294, 22 Am. St. Rep. 52; *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409, 19 Am. St. Rep. 180; *Lewis v. Selfert*, 116 Pa. St. 628, 2 Am. St. Rep. 631; *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *Corcoran v. Holbrook*, 59 N. Y. 517, 17 Am. Rep. 369; *Fay v. Minneapolis etc. Ry. Co.*, 30 Minn. 231; *Leonard v. Kinnare*, 174 Ill. 532; *Chicago etc. R. R. Co. v. Avery*, 109 Ill. 314; *Van Steenburgh v. Thornton*, 53 N. J. L. 160; *Louisville etc. Ry. Co. v. Graham*, 124 Ind. 89; *Indiana etc. Ry. Co. v. Snyder*, 140 Ind. 647; *Louisville etc. Ry. Co. v. Hanning*, 131 Ind. 528, 31 Am. St. Rep. 443; *Lindvall v. Woods*, 41 Minn. 212; *Morton v. Detroit etc. R. R. Co.*, 81 Mich. 423; *Elledge v. National City etc. Ry. Co.*, 100 Cal. 282, 38 Am. St. Rep. 290; *Krueger v. Louisville etc. Ry. Co.*, 111 Ind. 51; *Mullin v. California Horse-shoe Co.*, 105 Cal. 77; *McCauley v. Southern Ry. Co.*, 10 App. D. C. 560; *Donnelly v. Booth etc. Granite Co.*, 90 Me. 110; *Blazensie v. Iowa etc. Coal Co.*, 102 Iowa, 706; *Cooper v. Pittsburgh etc. R. R. Co.*, 24 W. Va. 37; *Browning v. Wabash Ry. Co.*, 124 Mo. 55; *Denver Tramway Co. v. Crumbaugh*, 23 Colo. 363; *Pennsylvania R. R. Co. v. La Rue*, 81 Fed. Rep. 148; *Quincy Minn. Co. v. Kitts*, 42 Mich. 34; *Baltimore etc. R. R. Co. v. Henthorne*, 73 Fed. Rep. 634; *Nord Deutscher etc. Steamship Co. v. Ingebregsten*, 57 N. J. L. 400, 51 Am. St. Rep. 604; *Mattise v. Consumers' Ice Mfg. Co.*, 46 La. Ann. 1535, 49 Am. St. Rep. 356; *Cheaney v. Ocean Steamship Co.*, 92 Ga. 726, 44 Am. St. Rep. 113; *Chicago etc. R. R. Co. v. Kneirim*, 152 Ill. 458, 43 Am. St. Rep. 259; *Pullman Palace Car Co. v. Gavin*,

98 Tenn. 53, 42 Am. St. Rep. 902; Railroad v. Spence, 98 Tenn. 173, 42 Am. St. Rep. 907; Monmouth etc. Mfg. Co. v. Erling, 149 Ill. 521, 39 Am. St. Rep. 187; Daniel v. Chesapeake etc. Ry. Co., 36 W. Va. 397, 32 Am. St. Rep. 870; Miller v. Missouri Pac. Ry. Co., 109 Mo. 350, 32 Am. St. Rep. 673; Sweeney v. Gulf etc. Ry. Co., 84 Tex. 433, 31 Am. St. Rep. 71; Nix v. Texas Pac. Ry. Co., 82 Tex. 473, 27 Am. St. Rep. 897; Dayharsh v. Hannibal etc. R. R. Co., 103 Mo. 570, 23 Am. St. Rep. 900; Brown v. Gilchrist, 80 Mich. 53, 20 Am. St. Rep. 496; Taylor v. Evansville etc. R. R. Co., 121 Ind. 124, 16 Am. St. Rep. 372; Cincinnati etc. R. R. Co. v. McMullen, 117 Ind. 439, 10 Am. St. Rep. 67; Anderson v. Bennett, 16 Or. 515, 8 Am. St. Rep. 311; Hough v. Railway Co., 100 U. S. 213; Chicago etc. R. R. Co. v. May, 106 Ill. 288; Woodson v. Johnston, 109 Ga. 454; Louisville etc. R. R. Co. v. Bowler, 9 Helsk. 866; New York etc. R. R. Co. v. O'Leary, 93 Fed. Rep. 737; Baltimore etc. R. R. Co. v. Baugh, 149 U. S. 363, 387; Grant v. Varney, 21 Colo. 329. The master is answerable whether such negligence consists in a failure to provide and maintain a safe place in which the employes may work: Edward Hines Lumber Co. v. Ligas, 172 Ill. 315, 64 Am. St. Rep. 38; Newbury v. Getchel etc. Mfg. Co., 100 Iowa, 441, 62 Am. St. Rep. 592; Flannegan v. Chesapeake etc. Ry. Co., 40 W. Va. 436; 52 Am. St. Rep. 896; McElligott v. Randolph, 61 Conn. 157, 29 Am. St. Rep. 181; Ell v. Northern Pac. R. R. Co., 1 N. Dak. 336, 26 Am. St. Rep. 621; Lewis v. Selfert, 116 Pa. St. 623, 2 Am. St. Rep. 631; Miller v. Southern Pac. Co., 20 Or. 285; Camp v. Hall, 39 Fla. 535; Van Dusen v. Letellier, 78 Mich. 492; Van Steenburgh v. Thornton, 58 N. J. L. 160; Louisville etc. Ry. Co. v. Graham, 124 Ind. 89; Louisville etc. Ry. Co. v. Hanning, 131 Ind. 528, 31 Am. St. Rep. 443; Elledge v. National City etc. Ry. Co., 100 Cal. 282, 38 Am. St. Rep. 290; Orman v. Mannix, 17 Colo. 564, 31 Am. St. Rep. 340; Krueger v. Louisville etc. Ry. Co., 111 Ind. 51; Pennsylvania Co. v. Whitcomb, 111 Ind. 212; Brazil Coal Co. v. Young, 117 Ind. 520; Mullin v. California Horse-shoe Co., 105 Cal. 77; Donnelly v. San Francisco Bridge Co., 117 Cal. 417; Blazenic v. Iowa etc. Coal Co., 102 Iowa, 706; Nadau v. White River Lumber Co., 76 Wis. 120, 20 Am. St. Rep. 29; Anderson v. Bennett, 16 Or. 515, 8 Am. St. Rep. 311; Northwestern Fuel Co. v. Danielson, 57 Fed. Rep. 915; Cook v. St. Paul etc. Ry. Co., 34 Minn. 45; Grant v. Varney, 21 Colo. 329; Moran v. Corliss Steam-Engine Co., R. I., July, 1899; in a failure to provide and keep in repair reasonably safe tools, appliances, and machinery for the accomplishment of the work necessary to be done: Indiana Car Co. v. Parker, 100 Ind. 181; Norfolk etc. R. R. Co. v. Houchins, 95 Va. 398, 64 Am. St. Rep. 791; Chicago etc. R. R. Co. v. Maroney, 170 Ill. 520, 62 Am. St. Rep. 396; Norton v. Volzke, 158 Ill. 402, 49 Am. St. Rep. 167; Monmouth etc. Mfg. Co. v. Erling, 148 Ill. 521, 39 Am. St. Rep. 187; Daves v. Southern Pac. Co., 98 Cal. 19, 35 Am. St. Rep. 133; McElligott v. Randolph, 61 Conn. 157, 29 Am. St. Rep. 181; Ell v. Northern Pac. R. R. Co., 1 N. Dak. 336, 26 Am. St. Rep. 621; Lewis

v. Selfert, 116 Pa. St. 623, 2 Am. St. Rep. 631; Fay v. Minneapolis etc. Ry. Co., 30 Minn. 231; Ogle v. Jones, 16 Wash. 319; Camp v. Hall, 39 Fla. 535; Leonard v. Kinnare, 174 Ill. 532; Chicago etc. R. R. Co. v. Avery, 109 Ill. 314; Van Dusen v. Letellier, 78 Mich. 492; Indiana etc. Ry. Co. v. Snyder, 140 Ind. 647; Morton v. Detroit etc. R. R. Co., 81 Mich. 423; Fink v. Des Moines Ice Co., 84 Iowa, 321, 325; Elledge v. National City etc. Ry. Co., 100 Cal. 282, 38 Am. St. Rep. 290; Chicago etc. R. R. Co. v. Kellogg, 54 Neb. 127, 137; Carter v. Oliver Oil Co., 34 S. C. 211, 27 Am. St. Rep. 815; Krueger v. Louisville etc. Ry. Co., 111 Ind. 51; Pennsylvania Co. v. Whitcomb, 111 Ind. 212; Mullin v. California Horseshoe Co., 105 Cal. 77; Donnelly v. San Francisco Bridge Co., 117 Cal. 417; McCauley v. Southern Ry. Co., 10 App. D. C. 560; Donnelly v. Booth etc. Granite Co., 90 Me. 110; Ohio etc. Ry. Co. v. Percy, 123 Ind. 197; Cooper v. Pittsburgh etc. R. R. Co., 24 W. Va. 37; Denver Tramway Co. v. Crumbaugh, 23 Colo. 363; Texas etc. Ry. Co. v. Barrett, 67 Fed. Rep. 214, 218; Pennsylvania R. R. Co. v. La Rue, 81 Fed. Rep. 148; Nord Deutscher etc. Steamship Co. v. Ingebregsten, 57 N. J. L. 400, 51 Am. St. Rep. 604; Mattise v. Consumers' Ice Mfg. Co., 46 La. Ann. 1535, 49 Am. St. Rep. 356; Chicago etc. R. R. Co. v. Kneirim, 152 Ill. 453, 43 Am. St. Rep. 259; Monmouth etc. Mfg. Co. v. Erling, 143 Ill. 521, 39 Am. St. Rep. 187; Orman v. Mannix, 17 Colo. 564, 31 Am. St. Rep. 340; Cincinnati R. R. Co. v. McMullen, 117 Ind. 439, 10 Am. St. Rep. 67; Anderson v. Bennett, 16 Or. 515, 8 Am. St. Rep. 311; Faren v. Sellers, 39 La. Ann. 1011, 4 Am. St. Rep. 256; Madden v. Chesapeake etc. Ry. Co., 28 W. Va. 610, 57 Am. Rep. 695; Smith v. Oxford Iron Co., 42 N. J. L. 467, 36 Am. Rep. 535; Snow v. Housatonic R. R. Co., 8 Allen, 441, 85 Am. Dec. 720; Fluke v. Boston etc. R. R. Co., 53 N. Y. 549, 13 Am. Rep. 545; Collyer v. Pennsylvania R. R. Co., 49 N. J. L. 59; Hough v. Railway Co., 100 U. S. 213; Pullman Palace Car Co. v. Laack, 143 Ill. 242; New York etc. R. R. Co. v. O'Leary, 93 Fed. Rep. 737; Lasure v. Graniteville Mfg. Co., 18 S. C. 275; in a failure to exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties: Daves v. Southern Pac. Co., 98 Cal. 19, 35 Am. St. Rep. 133; McElligott v. Randolph, 61 Conn. 157, 29 Am. St. Rep. 181; Harrison v. Detroit etc. R. R. Co., 79 Mich. 409, 19 Am. St. Rep. 180; Laning v. New York Cent. R. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Van Dusen v. Letellier, 78 Mich. 492; Galveston etc. Ry. Co. v. Farmer, 73 Tex. 85; Elledge v. National City etc. Ry. Co., 100 Cal. 282, 38 Am. St. Rep. 290; Donnelly v. San Francisco Bridge Co., 117 Cal. 417; Quincy Min. Co. v. Kitts, 42 Mich. 34; Baltimore etc. R. R. Co. v. Henthorne, 73 Fed. Rep. 634; Anderson v. Bennett, 16 Or. 515, 8 Am. St. Rep. 311; Tyson v. North etc. R. R. Co., 61 Ala. 654, 32 Am. Rep. 8; Harper v. Indianapolis etc. R. R. Co., 47 Mo. 567, 4 Am. Rep. 353; McDermott v. Hannibal etc. R. R. Co., 87 Mo. 285; St. Louis etc. Ry. v. Rice, 51 Ark. 467; in a failure to furnish and maintain safe buildings and structures to be used

by employes: Collyer v. Pennsylvania R. R. Co., 49 N. J. L. 59; Bowen v. Chicago etc. Ry. Co., 95 Mo. 268, 277; Chicago etc. R. R. Co. v. Swett, 45 Ill. 197, 92 Am. Dec. 206; in unnecessarily exposing a servant to danger and peril by directing him to work in a dangerous place: Anderson v. Bennett, 16 Or. 515, 8 Am. St. Rep. 311; Pullman Palace Car Co. v. Laack, 143 Ill. 242; McGovern v. Central Vt. R. R. Co., 123 N. Y. 280, 288; especially if he is a minor and exposed to a risk not connected with the service: Orman v. Mannix, 17 Colo. 564, 31 Am. St. Rep. 340; in putting a servant at work, particularly if he is a minor, in a place of increased danger, especially where the danger has been enhanced by a failure to provide and maintain machinery and to appoint competent servants to do the work: Newbury v. Getchel etc. Mfg. Co., 100 Iowa, 441, 62 Am. St. Rep. 582; Colorado etc. Ry. Co. v. Naylor, 17 Colo. 501, 31 Am. St. Rep. 335; Pullman Palace Car Co. v. Laack, 143 Ill. 242; Cumberland etc. R. R. Co. v. State, 44 Md. 283; in failing to notify an employe of a new or increased danger caused by some act of the employer: Pullman Palace Car Co. v. Laack, 143 Ill. 242; in failing to provide enough employes to do the work safely: Oheeney v. Ocean Steamship Co., 92 Ga. 726, 44 Am. St. Rep. 113; Flike v. Boston etc. R. R. Co., 53 N. Y. 549, 13 Am. Rep. 545; in failing to promulgate and enforce needful rules for the conduct of the business: Hartvig v. Northern Pac. etc. Co., 19 Or. 522, 526; Hankins v. New York etc. R. R. Co., 142 N. Y. 416, 40 Am. St. Rep. 616; Harrison v. Detroit etc. R. R. Co., 79 Mich. 409, 19 Am. St. Rep. 180; Bushby v. New York etc. R. R. Co., 107 N. Y. 374, 1 Am. St. Rep. 844; Gerrish v. New Haven Ice Co., 63 Conn. 9, 17; in failing to instruct and warn inexperienced servants of special dangers in their employment: Ingerman v. Moore, 90 Cal. 410, 25 Am. St. Rep. 138; Nadau v. White River Lumber Co., 76 Wis. 120, 20 Am. St. Rep. 29; Lebbering v. Struthers, 157 Pa. St. 312; Camp v. Hall, 39 Fla. 535; Smith v. Coal & Iron Co., 186 Pa. St. 28; Northwestern Fuel Co. v. Danielson, 57 Fed. Rep. 916; particularly where such servants are young persons: Addicks v. Christoph, 62 N. J. L. 786, 72 Am. St. Rep. 687; Norton v. Volzke, 153 Ill. 402, 49 Am. St. Rep. 167; Newbury v. Getchel etc. Mfg. Co., 100 Iowa, 441, 62 Am. St. Rep. 582; Ross v. Walker, 139 Pa. St. 42, 23 Am. St. Rep. 160; Camp v. Hall, 39 Fla. 535; Wallace v. Standard Oil Co., 66 Fed. Rep. 260; in failing to exercise reasonable diligence and care in the performance of the master's duty to supervise and inspect cars, machinery, appliances, and other instrumentalities used in work: Chicago etc. R. R. Co. v. Kneirim, 152 Ill. 453, 43 Am. St. Rep. 259; Nord Deutscher etc. Co. v. Ingebregsten, 57 N. J. L. 400, 51 Am. St. Rep. 604; International etc. Ry. Co. v. Kernan, 78 Tex. 294, 22 Am. St. Rep. 52; Goodrich v. New York etc. R. R. Co., 116 N. Y. 398, 15 Am. St. Rep. 410; Norfolk etc. R. R. Co. v. Ampey, 93 Va. 103; Van Dusen v. Letellier, 78 Mich. 492; St. Louis etc. Ry. v. Rice, 51 Ark. 467; Baltimore etc. R. R. Co. v. Elliott, 9 App. D. C. 341; Hustis v.

James A. Banister Co., 63 N. J. L. 465; Denver Tramway Co. v. Crumbaugh, 23 Colo. 363; Chicago etc. R. R. Co. v. Kellogg, 54 Neb. 127, 137; Miller v. Southern Pac. Co., 20 Or. 285, 294; Texas etc. Ry. Co. v. Archibald, 170 U. S. 665; Brann v. Chicago etc. R. R. Co., 53 Iowa, 595, 36 Am. Rep. 243; Atchison etc. R. R. Co. v. McKee, 37 Kan. 592; Chapman v. Southern Pac. Co., 12 Utah, 30; Cooper v. Pittsburgh etc. R. R. Co., 24 W. Va. 37; Norfolk v. Houchins, 95 Va. 398, 64 Am. St. Rep. 791; Mackey v. Baltimore etc. R. R. Co., 3 Mackey, 282; or in failing to take any other precaution for the safety and protection of employes which reasonable prudence requires: Pullman Palace Car Co. v. Laack, 143 Ill. 242.

It is true that all of the cases above cited showing the master's liability for any neglect of his personal, positive, absolute duties, where he has delegated their performance to a coemploye, do not discuss the effect of the rank or grade of the servant to whom such delegation is made, but the following cases among those cited do mention the question of "rank" or "grade," and clearly show that no duty which the master is required to perform for the safety and protection of his servants can be delegated to any servant of any grade, so as to exempt the master from liability to a servant who has been injured by its nonperformance: Dwyer v. American Exp. Co., 82 Wis. 307, 33 Am. St. Rep. 44; Miller v. Missouri Pac. Ry. Co., 109 Mo. 350, 32 Am. St. Rep. 678; Colorado etc. Ry. Co. v. Naylor, 17 Colo. 501, 31 Am. St. Rep. 335; McElligott v. Randolph, 61 Conn. 157, 29 Am. St. Rep. 181; Nix v. Texas Pac. Ry. Co., 82 Tex. 473, 27 Am. St. Rep. 897; Ell v. Northern Pac. R. R. Co., 1 N. Dak. 333, 26 Am. St. Rep. 621; Harrison v. Detroit etc. R. R. Co., 79 Mich. 409, 19 Am. St. Rep. 180; Galveston etc. Ry. Co. v. Smith, 76 Tex. 611, 18 Am. St. Rep. 78; Bushby v. New York etc. R. R. Co., 107 N. Y. 374, 1 Am. St. Rep. 844; Pullman Palace Car Co. v. Laack, 143 Ill. 242; Miller v. Southern Pac. Co., 20 Or. 285; Pantzar v. Tilly etc. Min. Co., 99 N. Y. 368; Benzing v. Steinway, 101 N. Y. 547; Van Dusen v. Letellier, 78 Mich. 492; Gerrish v. New Haven Ice Co., 63 Conn. 9, 17; Chapman v. Southern Pac. Co., 12 Utah, 30; and, as we understand the other cases cited, the same principle runs through all of them. The individual to whom a master's personal, positive, absolute duty is delegated is an agent, and the law of principal and agent must apply: Fink v. Des Moines Ice Co., 84 Iowa, 321, 325; Blazenic v. Iowa etc. Coal Co., 102 Iowa, 706.

Master's Liability.—As a master's liability immediately follows a violation of his duty, and as the subject is discussed in nearly all of the cases determining who are vice-principals, it will probably more clearly elucidate the subject under consideration to give here a general view of such liability. It is a rule, well understood, that a servant takes the risk of the service, but this rule presupposes that the master has performed the duties of caution, care, and vigilance which the law casts upon him; and the servant assumes those risks alone which cannot be obviated by the adoption of rea-

sonable measures of precaution by the master: *Pantzar v. Tilly etc.* Min. Co., 99 N. Y. 368, 376. An employé assumes for himself the ordinary and obvious dangers of the work or business in which he engages: *Carlson v. Northwestern etc. Exch. Co.*, 63 Minn. 428, 438; but he has a right to assume, without inquiry or examination, except where defects are known to him or are plainly observable by him, that the master's personal, positive, absolute duty to his servants, such as the selection of competent servants, the furnishing of suitable and safe tools, machinery, appliances, and other instrumentalities, the providing of a reasonably safe place in which to work, and the observance of such care as will not expose the servant to hazards and perils which may be guarded against by proper diligence, etc., has been performed: *Ayers v. Richmond etc. R. R. Co.*, 84 Va. 679, 682; *New York etc. R. R. Co. v. O'Leary*, 93 Fed. Rep. 737; *Whitney etc. Co. v. O'Bourke*, 172 Ill. 177; *Monmouth Min. etc. Co. v. Erling*, 148 Ill. 521, 39 Am. St. Rep. 187; *Leonard v. Kinnare*, 174 Ill. 532; *Norfolk etc. R. R. Co. v. Nunnally*, 88 Va. 546, 550; *Georgia Pac. Ry. Co. v. Davis*, 92 Ala. 300, 25 Am. St. Rep. 47; *Chicago etc. R. R. Co. v. Maroney*, 170 Ill. 520, 62 Am. St. Rep. 306; *Carter v. Oliver Oil Co.*, 34 S. C. 211, 27 Am. St. Rep. 815. The employé does not assume the risk of the master's negligence or that of any vice-principal to whom the master has intrusted his superintending authority concerning the duties mentioned: *Whalen v. Centenary Church*, 62 Mo. 326; *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409, 19 Am. St. Rep. 180; *Quincy Min. Co. v. Kitts*, 42 Mich. 34; *Taylor v. Evansville etc. R. R. Co.*, 121 Ind. 124, 16 Am. St. Rep. 372; *State v. Malster*, 57 Md. 287, 306; *Chicago etc. R. R. Co. v. Kneirim*, 152 Ill. 458, 43 Am. St. Rep. 259; *Colorado Cent. R. R. Co. v. Ogden*, 3 Colo. 499; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; *Chicago etc. R. R. Co. v. Avery*, 109 Ill. 314; *Union Pac. Ry. Co. v. O'Brien*, 161 U. S. 451; *Texas etc. Ry. Co. v. Archibald*, 170 U. S. 685; *Carlson v. Oregon etc. Ry. Co.*, 21 Or. 450; *Cook v. St. Paul etc. Ry. Co.*, 34 Minn. 45; *Northwestern Fuel Co. v. Danielson*, 57 Fed. Rep. 915.

In Michigan, when the master has delegated to a servant the care and management of the entire business, or a distinct department of it, and has charged him with the performance of duties toward an inferior servant which the law imposes upon the master, and the superior servant therefore stands in the place of the master, it is held that the rule of respondeat superior applies: *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409, 19 Am. St. Rep. 180; but in New York the liability of a master for the negligence of his servant, whereby another servant is injured, is held not to depend upon the doctrine of respondeat superior, but upon the omission of some duty of the master which is deputed to such inferior employé. If the act omitted is one of the kind which the master owes to his employé the duty of performing, he is answerable to the employé for the manner of its performance: *Hankins v. New York etc. R.*

R. Co., 142 N. Y. 416, 40 Am. St. Rep. 616. Whatever may be said, however, as to the application of the doctrine of respondeat superior to such cases, it is clear that the main test whether a master is answerable to one servant for the negligence of another servant is the character of the negligent act, without regard to the rank or grade of the offending servant. If the act is one incumbent upon the master, as a duty of the master to the servant, and is negligently performed or not performed either by the master or by one to whom its performance has been delegated by the master, and injury results, the master is liable; otherwise not: *Jackson v. Norfolk etc. R. R. Co.*, 43 W. Va. 880, 882; *Hankins v. New York etc. R. R. Co.*, 142 N. Y. 416, 40 Am. St. Rep. 616; *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409, 19 Am. St. Rep. 180; *McElligott v. Randolph*, 61 Conn. 157, 29 Am. St. Rep. 181; *Ell v. Northern Pac. R. R. Co.*, 1 N. Dak. 838, 28 Am. St. Rep. 621; *Galveston etc. Ry. Co. v. Smith*, 76 Tex. 611, 18 Am. St. Rep. 78; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; *Bushby v. New York etc. R. R. Co.*, 107 N. Y. 374, 1 Am. St. Rep. 844; *Chicago etc. R. R. Co. v. Swett*, 45 Ill. 197, 92 Am. Dec. 206; *Lewis v. Seifert*, 116 Pa. St. 628, 2 Am. St. Rep. 681; *Davis v. Central Vt. R. R. Co.*, 55 Vt. 84, 45 Am. Rep. 590; *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 621; *Flike v. Boston etc. R. R. Co.*, 53 N. Y. 549, 13 Am. Rep. 545; *Chicago etc. R. R. Co. v. Avery*, 109 Ill. 314; *Lindvall v. Woods*, 41 Minn. 212; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Capper v. Louisville etc. Ry. Co.*, 106 Ind. 305; *Benzing v. Steinway*, 101 N. Y. 547; *Baltimore etc. R. R. Co. v. Baugh*, 149 U. S. 368, 387.

The master is liable for negligence in the performance of duties he has impliedly contracted to perform toward his servant, no matter whether he attempts to perform them in person or by another; and the true test to determine whether the rule applies is to be found in the character of the act performed which causes the injury, and not in the rank, grade, or department of service of the person performing it. If there is a neglect of one of the duties the master has impliedly contracted to perform, he is liable, no matter what the rank or grade of the person he has designated to perform it: *Galveston etc. Ry. Co. v. Smith*, 76 Tex. 611, 18 Am. St. Rep. 78. The liability of a master who has not been guilty of any negligence or breach of duty in the employment of his servants for an injury to one of such servants caused by the negligence of another engaged in the same business, depends not upon the rank or grade of either servant, but upon the character of the act in the performance of which the injury is inflicted; and he is not liable unless the negligent act pertained to a matter in relation to which he owed a duty to the servant injured: *Dwyer v. American Exp. Co.*, 82 Wis. 307, 33 Am. St. Rep. 44. The rule that, where a master or principal delegates to an agent the performance of duties he owes to his employé, the former is liable for the manner in which they are performed, is applicable to a corporation as well as to an

individual: *Corcoran v. Holbrook*, 59 N. Y. 517, 17 Am. Rep. 369; *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409, 19 Am. St. Rep. 180. "The true rule, I apprehend," said Church, C. J., in the leading case of *Flike v. Boston etc. R. R. Co.*, 53 N. Y. 549, 13 Am. Rep. 545, "is to hold the corporation liable for negligence or want of proper care in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter should be deemed present, and consequently liable for the manner in which they are performed. If an agent employs unfit servants, his fault is that of the corporation, because it occurred in the performance of the principal's duty, although only an agent himself. So, in providing machinery or materials, and in the general arrangement and management of the business, he is in the discharge of the duty pertaining to the principal."

A master is liable for the negligence of a subordinate to whom he has intrusted the control of his entire business, or a separate and distinct branch of it, where he exercises no discretion or oversight of his own, and the agent's negligence consists in failing to supply and maintain suitable and safe instrumentalities for the conduct of the business, for such subordinate represents the master, and the neglect of the agent is the neglect of the principal: *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409, 19 Am. St. Rep. 180; *Stephens v. Hannibal etc. R. R. Co.*, 96 Mo. 207, 9 Am. St. Rep. 336; *Prevost v. Citizens' Ice etc. Co.*, 185 Pa. St. 617, 64 Am. St. Rep. 659; *Hussey v. Coger*, 112 N. Y. 614, 8 Am. St. Rep. 787; *Lewis v. Selfert*, 116 Pa. St. 628, 2 Am. St. Rep. 631; *Ryan v. Bagaley*, 50 Mich. 179, 45 Am. Rep. 35; *Mullan v. Philadelphia etc. Steamship Co.*, 78 Pa. St. 25, 21 Am. Rep. 2; *Willis v. Oregon etc. Nav. Co.*, 11 Or. 257; *Doughty v. Penobscot Log etc. Co.*, 76 Me. 143; *New York etc. R. R. Co. v. Bell*, 112 Pa. St. 400. A master is not an insurer of the safety of his employéa, but he must not be negligent: *Jackson v. Norfolk etc. R. R. Co.*, 43 W. Va. 380, 382; *Fosburg v. Phillips Fuel Co.*, 93 Iowa, 54. If personal or absolute obligations of the master have been intrusted to a servant, the latter is the representative of the master, and any negligence on his part is the negligence of the master: *Anderson v. Bennett*, 16 Or. 515, 8 Am. St. Rep. 311; *Baltimore etc. R. R. Co. v. McKenzie*, 81 Va. 71; *Krueger v. Louisville etc. Ry. Co.*, 111 Ind. 51; *Taylor v. Georgia Marble Co.*, 99 Ga. 512, 59 Am. St. Rep. 238; and a master is chargeable with the knowledge of his vice-principal: *Hess v. Rosenthal*, 160 Ill. 621; *Matties v. Consumers' Ice Co.*, 46 La. Ann. 1535, 49 Am. St. Rep. 356; *Baltimore etc. R. R. Co. v. McKenzie*, 81 Va. 71.

A master is answerable, where he has delegated any of his personal, positive, absolute duties, until they have been performed. It is not enough for him to be free from negligence in the appointment of competent servants and in preparing a safe place to work,

safe tools, appliances, machinery, etc. He must see that the agent intrusted with the master's duty performs it, and is liable for the agent's negligence if the duty is not performed: *Fox v. Spring Lake Iron Co.*, 89 Mich. 387, 394; *Ashman v. Flint etc. R. R. Co.*, 90 Mich. 567; *Thomas v. Ann Arbor R. R. Co.*, 114 Mich. 59; *McGovern v. Central Vt. R. R. Co.*, 123 N. Y. 280, 288; *Railway Co. v. Triplett*, 54 Ark. 289; *Deep Min. etc. Co. v. Fitzgerald*, 21 Colo. 533; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140, 3 Am. St. Rep. 92; *Smith v. Chicago etc. Ry. Co.*, 42 Wis. 520, 526; *Collyer v. Pennsylvania R. R. Co.*, 49 N. J. L. 59; *Smith v. Hillside etc. Iron Co.*, 186 Pa. St. 28; *Belleville Stone Co. v. Mooney*, 60 N. J. L. 323. Thus, if one servant is injured through the negligence of another in failing to discover defects in machinery or appliances, and the latter is not engaged in using the apparatus in a common employment with the servant injured, then the offending servant, in his duty, represents the master, who is chargeable with his defaults and answerable for injuries suffered by the other servant therefrom: *Nord Deutscher etc. S. S. Co. v. Ingebregsten*, 57 N. J. L. 400, 51 Am. St. Rep. 604.

A master is not, however, answerable for all negligent acts of his agent whereby another servant or employé is injured. Where the negligence is in an act which the master must personally perform, the person to whom he delegates its performance is his agent, and the master is answerable for the negligence: *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417, 424; *Jackson v. Norfolk etc. R. R. Co.*, 43 W. Va. 380. If, on the other hand, it is an act which may be delegated to another, or may be performed by an employé, the person by whom it is performed, although he may be charged with special duties, is a fellow-servant with the other employés, irrespective of his rank, and the master is not answerable to them for his negligence in its performance: *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417, 424; *Malone v. Hathaway*, 64 N. Y. 5, 21 Am. Rep. 573; *McCosker v. Long Island R. R. Co.*, 84 N. Y. 77; *Byrnes v. New York etc. R. R. Co.*, 113 N. Y. 251, 258; *Perry v. Rogers*, 157 N. Y. 251; *Hard v. Vermont etc. R. R. Co.*, 32 Vt. 473; *Gilmore v. Oxford etc. Nail Co.*, 55 N. J. L. 39; *Deep Min. etc. Co. v. Fitzgerald*, 21 Colo. 533; *Guggenheim Smelting Co. v. Flanigan*, 62 N. J. L. 354; *Ross v. Walker*, 139 Pa. St. 42, 23 Am. St. Rep. 160; *Kimmer v. Weber*, 151 N. Y. 417, 56 Am. St. Rep. 630. It has even been held that, where a master properly selects a fellow-servant to give warning of the starting of machinery, and instructs him for that purpose, he is not answerable for the negligence of such servant in the performance of such duty, resulting in injury to a coemployé, as a servant, in entering upon an employment, assumes the risk of the negligence of fellow-servants: *Portance v. Lehigh Valley Coal Co.*, 101 Wis. 574, 70 Am. St. Rep. 932.

That one servant is superior to another does not change his relation of fellow-servant unless the superiority places him in the category of vice-principal: *Richmond Locomotive Works v. Ford*, 94

Va. 627. It has been held, as between coservants, that a master performs his duty of inspection by providing a system of inspection and intrusting its performance to competent hands: *Byrnes v. New York etc. R. R. Co.*, 113 N. Y. 251; but if a master delegates to an agent the duty or authority of making proper tests and inspection of machinery and appliances, he is answerable to his servants and employes for injuries received by them from the negligence of the agent to whom these duties have been delegated: *Nord Deutscher etc. Steamship Co. v. Ingebregsten*, 57 N. J. L. 400, 51 Am. St. Rep. 604. Compare *Belleville Stone Co. v. Mooney*, 60 N. J. L. 323. As between coservants, a master, who has performed his duty, is not liable, in case of injury, for an act of mere operation, no matter by what servant it is done: *Norfolk etc. R. R. Co. v. Houchins*, 95 Va. 398, 64 Am. St. Rep. 791; *Snow v. Housatonic R. R. Co.*, 8 Allen, 441, 85 Am. Dec. 720; *Jackson v. Norfolk etc. R. R. Co.*, 43 W. Va. 380, 383; *Krueger v. Louisville etc. Ry. Co.*, 111 Ind. 51. The ordinary use of machines and appliances may be left to competent hands, calling for no attention by the master, where he has supplied the servants with suitable machines and appliances: *Daley v. Boston etc. R. R. Co.*, 147 Mass. 101, 114; *Wosbigian v. Washburn etc. Mfg. Co.*, 167 Mass. 20, 22; *Snow v. Housatonic R. R. Co.*, 8 Allen, 441, 85 Am. Dec. 720; and a master is not answerable to one servant for the negligence of another servant in the management and use of suitable structures and engines in carrying on the master's work: *Holden v. Fitchburg R. R. Co.*, 129 Mass. 268, 37 Am. Rep. 343. So, a master is not liable for the negligence of a vice-principal, who was a fellow-servant, as to the act done: *Jackson v. Norfolk etc. R. R. Co.*, 43 W. Va. 380; *Quinn v. New Jersey Lighterage Co.*, 23 Fed. Rep. 363; *Stockmeyer v. Reed*, 55 Fed. Rep. 259. But a master cannot be exempted for an act, not one of mere operation, but of his personal duty, though done by any servant: *Norfolk etc. R. R. Co. v. Houchins*, 95 Va. 398, 408, 64 Am. St. Rep. 791, 800; *Jackson v. Norfolk etc. R. R. Co.*, 43 W. Va. 380, 384. The fellow-servant rule does not apply where the negligent fellow-servant bears to the injured servant the relation of vice-principal: *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711; but, to make a master answerable for the acts of a superior servant, the latter must so far stand in the place of the master as to be charged in the particular matter with the performance of a duty toward the inferior servant, which, under the law, the master owes to such servant: *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711, 717; *Allen v. Goodwin*, 92 Tenn. 385. If a master gives an express order not only what to do but how to do it, even a vice-principal is bound to obey; and becomes, for the time, a mere coemploye, and the master is not answerable to another employe for injury received through such vice-principal's directing the work to be done in a manner different from that directed by the master. He is not bound to personally supervise the doing of the work, but is entitled to assume

that his orders will be carried out: *Prevost v. Citizens' Ice etc. Co.*, 185 Pa. St. 617, 64 Am. St. Rep. 659. It is clear that a master, who has failed to perform his duty as to the protection and safety of his servants, in consequence of which one is injured by another, is answerable, whether the offending servant holds a representative position or is merely a fellow-servant; but it is without the scope of this note to discuss the latter class of cases: See *Cumberland etc. R. R. Co. v. State*, 44 Md. 283.

The acts of a person authorized by the master to perform a duty which the master owes to his servant, in so far as they pertain to that duty, are the acts of the master, and when the servant is injured by reason of a failure to perform it, the master cannot escape liability by setting up that the duty devolved upon a fellow-servant of the person injured: *Cheaney v. Ocean Steamship Co.*, 92 Ga. 726, 44 Am. St. Rep. 113; *Troxler v. Southern Ry. Co.*, 124 N. C. 189, 70 Am. St. Rep. 580; *Romona etc. Stone Co. v. Phillips*, 11 Ind. App. 118; *Crystal Ice Co. v. Sherlock*, 37 Neb. 19; *Addicks v. Christoph*, 62 N. J. L. 786, 72 Am. St. Rep. 687; *Smith v. Hillside etc. Iron Co.*, 186 Pa. St. 28; *Moon v. Richmond etc. R. R. Co.*, 78 Va. 745, 49 Am. Rep. 401; *Wilson v. Charleston etc. Ry.*, 51 S. O. 79, 96; *Hough v. Railway Co.*, 100 U. S. 213, 218; *Dobson v. New Orleans etc. R. R. Co.*, 52 La. Ann. 1127; or that the master was ignorant of defects where he might, by proper care, have discovered and remedied them: *Bensing v. Steinway*, 101 N. Y. 547. But the plaintiff must show that the injury was not caused by a fellow-servant: *Blessing v. St. Louis etc. Ry. Co.*, 77 Mo. 410; and he cannot recover for injury caused by a negligent and incompetent vice-principal where he, before the injury, had knowledge of such negligence and incompetency: *McDermott v. Hannibal etc. Ry. Co.*, 87 Mo. 285, 298. A servant injured by the negligence of another servant must show, by his complaint, that some duty of the master to him has been violated in order to hold the latter liable, and if such duty is one the discharge of which has been delegated by the master to a servant, not only the duty, but the delegation of it, as well as its violation, must be alleged and shown by the complaint: *New Pittsburgh etc. Coke Co. v. Peterson*, 136 Ind. 398, 48 Am. St. Rep. 327. See, also, *Libby v. Scherman*, 146 Ill. 540, 37 Am. St. Rep. 191. And the court should, especially if requested, instruct the jury as to the distinction, concerning the master's liability, between the official negligence of a vice-principal and the individual negligence of a mere fellow-servant: *National Fertilizer Co. v. Travis*, 102 Tenn. 16. Compare *Libby v. Scherman*, 146 Ill. 540, 37 Am. St. Rep. 191; *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711. It is to be observed, however, that one who knows of a danger from the negligence of another, and understands and appreciates the risk therefrom and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure. This doctrine, in one form or another, is given effect, as showing that in a

case to which it applies there is either no negligence toward the plaintiff on the part of the defendant or a want of due care on the part of the plaintiff: *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 31 Am. St. Rep. 537.

In England, the question of the liability of employers to make compensation for personal injuries suffered by workmen in their service is governed by what is known as the employers' liability act, 43 and 44 Victoria, chapter 42; and the same matter is now controlled by statute in some states of our Union.

Agents, Generally.—We have shown that wherever you can trace a duty which the master owes to his servant which has not been performed, and through such nonperformance injury has resulted to an employé, the master is liable; otherwise not. An effort will now be made to show more particularly what persons may represent the master so as to stand in his place. Thus, an agent intrusted by the master with the power of appointing and removing the employés of a corporation: *Tyson v. North etc. R. R. Co.*, 61 Ala. 554, 32 Am. Rep. 8; or with the duty of engaging men for railway service: *Laning v. New York etc. R. R. Co.*, 49 N. Y. 521, 10 Am. Rep. 417; *Harper v. Indianapolis etc. R. R. Co.*, 47 Mo. 567, 4 Am. Rep. 358; or with the duty of furnishing safe machinery: *Mitchell v. Robinson*, 80 Ind. 281, 41 Am. Rep. 812; represents the master, who is liable for his negligence.

Bridge Builders.—In an action on behalf of a fireman of a railway company, killed by the washout of a culvert, the negligence of the company's bridge builder in constructing and of the roadmaster in repairing the culvert is attributable to the company, although they were ordinarily skillful and careful men in their several employments: *Davis v. Central Vt. R. R. Co.*, 55 Vt. 84, 45 Am. Rep. 590.

Carpenters.—Where the plaintiff is employed in a factory, and the floor of the room in which he works has to be taken up and replaced by a gang of workmen, he having no duty to perform in connection with them, he and they are not fellow-servants, and he may recover of their common master for injuries suffered from their negligence, for the carpenters, in such a case, represent the master: *Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 59 Am. St. Rep. 859. So a carpenter in the shops of a railroad company, who is required by the company to make hand-car handles and put them in place is, as to such service, a vice-principal and not a fellow-servant. The master is, therefore, answerable where a section hand is, in the course of his employment, injured while using a defective handle made by the carpenter: *Indiana etc. Ry. Co. v. Snyder*, 140 Ind. 647. Carpenters employed by a lumber company to inspect, and repair, if necessary, a platform used by an employé in loading and unloading lumber, are not fellow-servants of the employé, but representatives of the company, for the particular work stated: *Ohesson v. John L. Roper Lumber Co.*, 118 N. O. 59. If one employs a carpenter to construct a scaffold upon which men are to work, the

carpenter is a vice-principal and his negligence is that of the employer. The carpenter is not a fellow-servant with a hod carrier who was injured by the falling of the scaffold, even though the work of the carpenter promoted the erection of the building: *McNamara v. Macdonough*, 102 Cal. 575. The law of fellow-servants has no proper application to such a case.

A *Chain Gang Boss* is not a fellow-servant of a prisoner working under him. While acting in that capacity, he is the alter ego of his employer, and the latter is answerable for any wrongful or negligent acts on the part of such employé by which a prisoner is deprived of his life: *Boswell v. Barnhart*, 96 Ga. 521, 523.

Conductors of Railway Trains.—The weight of authority seems to support the proposition that a conductor in charge of a regular passenger train, and who, as such conductor, has full control of its movements is not, while in the performance of his usual and ordinary duties with reference thereto, a fellow-servant of an engineer, fireman, or brakeman working under his orders, but is a vice-principal of the railroad company. He is a representative of the principal, who is answerable to those working under the orders of the conductor for the latter's negligence: *Spencer v. Brooks*, 97 Ga. 681, 690; *Walker v. Gillett*, 59 Kan. 214; *Mason v. Richmond etc. R. R. Co.*, 114 N. O. 718; *Georgia Pac. Ry. Co. v. Davis*, 92 Ala. 300, 25 Am. St. Rep. 47; *Daniel v. Chesapeake etc. Ry. Co.*, 36 W. Va. 337, 32 Am. St. Rep. 870; *Railroad v. Spence*, 93 Tenn. 173, 42 Am. St. Rep. 907; *Boatwright v. Northeastern R. R. Co.*, 25 S. C. 128; *Ayers v. Richmond etc. R. R. Co.*, 84 Va. 679; *Railroad v. Kenley*, 92 Tenn. 207; *Purcell v. Southern Ry. Co.*, 119 N. O. 728, 737; *Northern Pac. R. R. Co. v. Poirier*, 67 Fed. Rep. 881, 884; *Haney v. Pittsburgh etc. Ry. Co.*, 38 W. Va. 570; *Van Amburg v. Vicksburg etc. R. R. Co.*, 87 La. Ann. 650, 55 Am. Rep. 517; *Mase v. Northern Pac. R. R. Co.*, 57 Fed. Rep. 283; *Richmond etc. R. R. Co. v. Williams*, 86 Va. 165, 19 Am. St. Rep. 876; *Mason v. Richmond etc. R. R. Co.*, 111 N. O. 482, 32 Am. St. Rep. 814; *Chicago etc. Ry. Co. v. Ross*, 112 U. S. 877; *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 415; *Cleveland etc. R. R. Co. v. Keary*, 3 Ohio St. 201; *Northern Pac. R. R. Co. v. Beaton*, 64 Fed. Rep. 563, 569. Compare *Culpepper v. International etc. Ry. Co.*, 90 Tex. 627, and particularly the dissenting opinion of Mr. Justice Harlan in *New England R. R. Co. v. Conroy*, 175 U. S. 323, 347.

As said in *Chicago etc. Ry. Co. v. Ross*, 112 U. S. 877, 394: "The conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of the company." If a fireman is under the control of a railway conductor,

and is required to submit to and obey his orders, the railroad company is answerable if the fireman is injured by the negligence of the conductor in passing a station, when it was his duty to stop there until the arrival of another train coming from an opposite direction, and, by reason of his not stopping, the two trains necessarily came into collision, from which the fireman received the injury; for, in such a case, the conductor is a vice-principal or representative of the master: *Railroad v. Spence*, 93 Tenn. 173, 42 Am. St. Rep. 907; *Ragsdale v. Northern Pac. R. R. Co.*, 42 Fed. Rep. 383. When a railroad brakeman, acting under the order of the conductor on a train, but contrary to the rules of the company, to which he has assented, is injured in coupling defective cars, of which defect the company has, or ought to have, knowledge, and of which the brakeman has no notice until too late to avoid the injury, the company is liable therefor, because the conductor represents the corporation: *Mason v. Richmond etc. R. R. Co.*, 111 N. C. 482, 32 Am. St. Rep. 814. And, if the rules of a railway company hold a conductor answerable for the proper handling and position of switches while in use, the delegation of this important duty to him makes him a vice-principal, and the company is answerable for injuries caused to an engineer by reason of his engine running into an occupied sidetrack, through a switch negligently left open and unguarded by the conductor of another train: *Mase v. Northern Pac. R. R. Co.*, 57 Fed. Rep. 283, 286. If a railroad engineer, with the knowledge and permission of the conductor in charge of the train, leaves his engine to be operated by an inexperienced fireman, and the brakeman on the train is injured through the negligence of such fireman, the railroad company is liable for the injury. In such case, the conductor is the representative of the company, and not a fellow-servant with the brakeman: *Norfolk etc. R. R. Co. v. Thomas*, 90 Va. 205, 44 Am. St. Rep. 906. A railway company is also liable for the death of its engineer on one train, caused by the negligence of its conductor on another train and of its telegraph operator: *Madden v. Chesapeake etc. Ry. Co.*, 28 W. Va. 610, 57 Am. Rep. 695.

The conductor in charge and in control of a freight train, and of the persons employed thereon, and who is answerable for its movements, is also generally regarded as a vice-principal or representative of the railroad company, which is answerable to brakemen and others working under the conductor for the latter's negligence: *Spencer v. Brooks*, 97 Ga. 687; *Canadian Pac. Ry. Co. v. Johnston*, 61 Fed. Rep. 738, 745; *Georgia Pac. Ry. Co. v. Propst*, 83 Ala. 518; *Johnson v. Richmond etc. R. R. Co.*, 84 Va. 713; *Richmond etc. R. R. Co. v. Brown*, 80 Va. 749; *Norfolk etc. R. R. Co. v. Ampey*, 93 Va. 108; *Clark v. Hughes*, 51 Neb. 780; *Cowles v. Richmond etc. R. R. Co.*, 84 N. C. 309, 37 Am. Rep. 620. It is said, however, in *New England R. R. Co. v. Conroy*, 175 U. S. 823, 841, 843, that the court went too far, in *Chicago etc. R. R. Co. v. Ross*, 112 U. S. 377, above cited, in holding that a conductor of a freight train

is, *ipso facto*, a vice-principal of the railroad company; and that, in so far as the decision in that case is to be understood as laying it down as a rule of law to govern in the trial of actions against railroad companies that the conductor, merely from his position as such, is a vice-principal, whose negligence is that of the company, it must be deemed to have been overruled, in effect if not in terms, in the subsequent case of *Baltimore etc. R. R. Co. v. Baugh*, 149 U. S. 868. A conductor of a material train, whose duty is to adjust switches, stands in the place of the master: *Coleman v. Wilmington etc. R. R. Co.*, 25 S. O. 446, 60 Am. Rep. 516; and a conductor having charge of a construction train, and a foreman having charge of a crew of men engaged in constructing a railroad track, with power to direct their movements, are both vice-principals, and the railroad company is liable for their negligence resulting in death or injury to any of such crew: *Miller v. Missouri Pac. Ry. Co.*, 109 Mo. 350, 82 Am. St. Rep. 673. The conductor of a repair train on the main line of a railroad is a vice-principal as to the section foreman of a branch line who is injured by the conductor's negligence while riding on a repair train under orders from the railway superintendent to take all his section hands and assist in repairing the main line: *Union Pac. Ry. Co. v. O'Naghan*, 56 Fed. Rep. 988.

The rule that a conductor in control of a railway train is a vice-principal is not, however, accepted in all jurisdictions. In some states, a conductor is a fellow-servant with a brakeman and other employes on a passenger train, and not a vice-principal: *Campbell v. Cook*, 88 Tex. 630, 40 Am. St. Rep. 878; *Sherman v. Rochester etc. R. R. Co.*, 17 N. Y. 153; *Jackson v. Norfolk etc. R. R. Co.*, 48 W. Va. 389; *Brown v. Central Pac. R. R. Co.*, 72 Cal. 523. So a conductor, in some states, is a fellow-servant with a brakeman and other employes on a freight train, and not a vice-principal: *Norfolk etc. R. R. Co. v. Houchins*, 95 Va. 398, 64 Am. St. Rep. 791; *La Pierre v. Chicago etc. Ry. Co.*, 99 Mich. 212; *Louisville etc. Ry. Co. v. Southwick*, 16 Ind. App. 486; and a brakeman of a freight train and the conductor and other employes of a passenger train of the same railroad company have been held to be fellow-servants: *McMaster v. Illinois Cent. R. R. Co.*, 65 Miss. 264, 7 Am. St. Rep. 653; *New England R. R. Co. v. Conroy*, 175 U. S. 823. It has been held that a conductor, engineer, and fireman on the same train are, *prima facie*, fellow-servants: *Grattis v. Kansas City etc. R. R. Co.*, 153 Mo. 380; and that in the absence of evidence of special and unusual powers having been conferred upon the conductor of a freight train, he, the engineer, and the brakeman must be deemed fellow-servants: *New England R. R. Co. v. Conroy*, 175 U. S. 823, 840. Under such circumstances the conductor is a fellow-servant of the fireman, and not a vice-principal of the railroad company: *Meyer v. Illinois Cent. R. R. Co.*, 177 Ill. 591. Perhaps a multitude of decisions of like character might be found, but they would lead us into the field of fellow-service, which it is not the purpose of

this note to discuss. We shall, therefore, dismiss this subdivision by saying that a conductor does not sustain the relation of vice-principal toward a section master, in the employment of the company, who is not subject to the orders or command of such conductor: *Wright v. Northampton etc. R. R. Co.*, 122 N. O. 852.

Elevator Managers and Instructors.—If there is an elevator in a mill, used by employes in passing from one floor to another, the management of which is intrusted entirely to a general agent, who has full power, and the elevator gets out of repair and unsafe, of which facts the agent has notice, and the agent neglects to repair, the master is answerable if the elevator falls and injures an employe who is using it in the course of his employment, because the agent is not a mere fellow-servant, but occupies the place of the master: *Corcoran v. Holbrook*, 59 N. Y. 517, 17 Am. Rep. 369. So the duty of a master to a servant who is to be placed in charge of an elevator, of the management of which he is ignorant, is not fully performed by putting him under the instruction of as competent an instructor as is the master. The duty of the master is to furnish a competent instructor, whether the master himself possesses competency to perform that duty or not; and the master is still answerable, however competent the instructor, if the latter does not continue his instructions for a reasonable length of time, or is guilty of negligence through which the servant to be instructed is injured. During this period of time the instructor is doing the work, and standing in the place, of the master: *Brennan v. Gordon*, 118 N. Y. 439, 16 Am. St. Rep. 775.

Employe, Generally.—If a master delegates to one of his employes such authority as subjects the will and discretion of all other employes, in and about a particular business, to the direction and control of the person to whom that authority is delegated, he will be said to be a vice-principal, and to stand in the relation of the master himself. His negligence may, therefore, be imputed to the master, who will be answerable in case of injury: *Taylor v. Georgia Marble Co.*, 99 Ga. 512, 50 Am. St. Rep. 238; *Foster v. Missouri Pac. Ry. Co.*, 115 Mo. 165; *Louisville etc. Ry. Co. v. Graham*, 124 Ind. 89; *Dobbin v. Richmond etc. R. R. Co.*, 81 N. O. 446, 31 Am. Rep. 512; as where an employe whose duty is to prepare a safe place in which workmen may labor fails to do so: *Stucke v. Orleans R. R. Co.*, 50 La. Ann. 172, 202; or where an employe, whose duty is to furnish a safe appliance, such as a safe halyard, to be used in loading a schooner fails to do so: *Donnelly v. Booth etc. Granite Co.*, 80 Me. 110; or where an employe, whose duty is to employ competent agents, employs unfit persons to maintain and repair a road and carry on the business of the master: *Mobile etc. Ry. Co. v. Smith*, 59 Ala. 245; or where men, regularly employed to keep a flight of stairs in a factory in repair, fail to do so: *Ferris v. Hershheim*, 51 La. Ann. 178. A workman in a manufactory, whose duty is to maintain a good and suitable supply of material

from which other workmen may select material for their own use, is a vice-principal, and not a fellow-servant of such workmen: *Precott v. Ball Engine Co.*, 176 Pa. St. 459, 53 Am. St. Rep. 683. An employé, however, hired by the month, at iron works, though he manages the business in a general way, is only a fellow-servant, where he is under the constant supervision and control of the officials of the company, and nothing of importance is left to his discretion and judgment: *Yates v. McCullough Iron Co.*, 69 Md. 370, 386. As to what particular employés are vice-principals, see the specific heads elsewhere given in this note.

Engineers.—A chief engineer, who is in charge and has the management of his employer's factory, with full control of the firemen and coal passers employed therein, and full authority to provide for their safety, is a vice-principal, who, in the absence of his employer, must supply safe machinery and keep it in repair. His failure to perform this duty renders his employer liable to an inferior employé injured thereby. He is not a fellow-servant with a coal passer at the boilers of the factory: *Mattise v. Consumers' Ice etc. Co.*, 46 La. Ann. 1535, 49 Am. St. Rep. 356. If a fireman is placed under an engineer in a mill, as his superior, and the latter has a right to give orders, the engineer represents the employer, who is answerable for the engineer's negligence: *Mann v. Oriental Print Works*, 11 R. I. 152, 155. And the duty which a master owes toward his servants in a factory to have overhead shafting supported and maintained, so as not to endanger employés working under it, cannot be delegated to an engineer placed in charge of the machinery so as to exempt the master from liability, in case of injury: *Hustis v. James A. Banister Co.*, 63 N. J. L. 465. If an engineer in the employ of a railway corporation has the sole charge, control, and management of a train and the brakemen thereon, so that the latter are under the duty of obeying his orders, they are not fellow-servants; but the engineer is a vice-principal, and a brakeman may recover damages of the company for injuries caused by the negligence of the engineer: *Taylor v. Georgia Marble Co.*, 99 Ga. 512, 59 Am. St. Rep. 238. So an engineer, having authority to place a fireman in charge of an engine, represents the master, if he puts an inexperienced and incompetent fireman in charge of the engine, and the master is answerable for the engineer's negligence in so doing: *Core v. Ohio River R. R. Co.*, 38 W. Va. 456, 471. A railway engineer and inspector of cars are not fellow-servants, after the engineer's duties have ceased, and the company is liable for an injury to the inspector caused by the engineer's negligence: *Chicago etc. R. R. Co. v. Hoyt*, 122 Ill. 369. So a locomotive engineer, charged with the duty of inspecting his engine, represents the railroad company. He is, therefore, a vice-principal, and not a fellow-servant of a "hostler's" helper engaged in switching engines in the railroad yard: *Atchison etc. R. R. Co. v. Mulligan*, 67 Fed. Rep. 569, 573. And a fireman upon a locomotive, during the performance of

his duties, may properly be found to have been acting under the immediate control of the engineer: *Cooper v. Central R. R.*, 44 Iowa, 184. But in *Nashville etc. R. R. Co. v. Wheless*, 10 Lea, 741, 43 Am. Rep. 317, it is held that a railway company is not liable to a brakeman for an injury sustained through the negligence of an engineer, where it is not shown that the engineer stands in the place of the master, and it does appear that each one is performing his particular duty under the orders, express or implied, of the conductor: *Nashville etc. R. R. Co. v. Wheless*, 10 Lea, 741, 43 Am. Rep. 317. So an engineer in charge of an engine in an ice factory, who is directed by his superior to do certain work necessary to the removal of ice from the pipes, and who, in turn, gives directions to another employé for the doing of such work, is not a vice-principal, but a fellow-servant with the latter, and hence their common employer is not liable for the negligence of such engineer in giving directions, though they lead to the injury of the other employé: *Prevost v. Citizens' Ice etc. Co.*, 185 Pa. St. 617, 64 Am. St. Rep. 659. In Kentucky, a fireman on a railroad train, while acting as engineer, is a "superior" employé to a brakeman thereon, but the company is liable for the gross negligence of its conductor and engineer, in failing to exercise any care for the protection of the brakeman, while engaged in going between moving cars: *Greer v. Louisville etc. R. R. Co.*, 94 Ky. 169, 42 Am. St. Rep. 345. See subdivision, "Railway Employés, Generally," *infra*.

Foremen.—In some states, a foreman of a gang of men, vested with the control and supervision of a particular work to be done, and with power to superintend, direct, command, and control the men under him in their work, is held to represent the employer, and to be his vice-principal, thus rendering the master answerable for the negligence of the foreman: *Bloyd v. St. Louis etc. Ry. Co.*, 58 Ark. 66, 41 Am. St. Rep. 85; *Stephens v. Hannibal etc. R. R. Co.*, 96 Mo. 207, 9 Am. St. Rep. 336; *Moore v. Wabash etc. Ry. Co.*, 85 Mo. 588; *Johnson v. First Nat. Bank*, 79 Wis. 414, 24 Am. St. Rep. 722; *Fort Smith Oil Co. v. Slover*, 58 Ark. 168; *Schroeder v. Chicago etc. R. R. Co.*, 108 Mo. 322, 328; *Lindvall v. Woods*, 44 Fed. Rep. 855; *Walker v. Gillett*, 59 Kan. 214, 218; *Missouri Pac. Ry. Co. v. Perego*, 36 Kan. 424, 427; *Colorado etc. Ry. Co. v. O'Brien*, 16 Colo. 219; *Carlson v. Northwestern etc. Co.*, 63 Minn. 428; *Orman v. Mannix*, 17 Colo. 564, 31 Am. St. Rep. 340; *Colorado etc. Ry. Co. v. Naylor*, 17 Colo. 501, 31 Am. St. Rep. 335; *Sioux City etc. R. R. Co. v. Smith*, 22 Neb. 775; particularly where the power to employ and discharge workmen is coupled with the foreman's other authority: *Colorado etc. Ry. Co. v. O'Brien*, 16 Colo. 219; *Colorado etc. Ry. Co. v. Naylor*, 17 Colo. 501, 31 Am. St. Rep. 335; *Orman v. Mannix*, 17 Colo. 564, 31 Am. St. Rep. 340; *Bloyd v. St. Louis etc. Ry. Co.*, 58 Ark. 66, 41 Am. St. Rep. 85; *Missouri Pac. Ry. Co. v.*

Williams, 75 Tex. 4, 16 Am. St. Rep. 867; *Johnson v. First Nat. Bank*, 79 Wis. 414, 24 Am. St. Rep. 722; *Blomquist v. Chicago etc. Ry. Co.*, 60 Minn. 426, 428; *McDonough v. Great Northern Ry. Co.*, 15 Wash. 244; *International etc. Ry. Co. v. Hinzle*, 82 Tex. 623, 680. Where the general power to manage and command is given to one, and the duty of the others is merely to execute and obey, he who directs stands in the place of the principal, who must respond to those under him for his misconduct: *Walker v. Gillett*, 59 Kan. 214, 218. Otherwise stated, a servant who is in a position of authority over a subordinate servant is not, in the sense of the law, as announced in many cases, a fellow-servant in a common employment, but represents the master, who is liable for his negligence: *Railroad v. Spence*, 93 Tenn. 173, 179, 42 Am. St. Rep. 907, 911.

Thus, it is held in *Bloyd v. St. Louis etc. Ry. Co.*, 58 Ark. 66, 41 Am. St. Rep. 85, that a foreman of a gang of railway workmen, engaged in repairing trestles and bridges, and having power to employ and discharge such men, and to oversee and direct their work, is a vice-principal of the railway company, and it is liable for his negligence whereby one of the workmen receives an injury. So a foreman employed by a railroad company, and having charge of a gang of men who are subject to his orders only, is the agent of the company, and the latter is liable for his negligence in respect to the orders given, as a foreman and the gang of men are not fellow-servants: *Stephens v. Hannibal etc. R. R. Co.*, 96 Mo. 207, 9 Am. St. Rep. 336. And the foreman of a company of men engaged in the business of repairing bridges, water-tanks, and telegraph lines on a railway, represents the railroad company, where he has control and authority over the men, and the company is answerable for his negligence in case of injury: *Sioux City etc. R. R. Co. v. Smith*, 22 Neb. 775, 781. A foreman of car repairers, who has sole charge of the hands employed to repair cars is a vice-principal: *Moore v. Wabash etc. Ry. Co.*, 85 Mo. 588, 595; and a car repairer is not a fellow-servant with a foreman of car repairers, with power to employ and discharge servants under him; but the company is liable for an injury to such car repairer received through the negligence of such foreman and while engaged in extra-hazardous employment under his order and promise of protection: *Missouri Pac. Ry. Co. v. Williams*, 75 Tex. 4, 16 Am. St. Rep. 867. If a superintendent and foreman, in the construction of a building, employ and discharge workmen, and direct them what to do, such superintendent and foreman are vice-principals in respect to their employers: *Johnson v. First Nat. Bank*, 79 Wis. 414, 24 Am. St. Rep. 722. A local boss, or foreman, with authority to control and direct the men and machinery employed, and to discharge such men at pleasure, is a vice-principal, and not a fellow-servant, and the master is liable for his negligence in ordering a minor employé into a situation of danger, and to perform an act entirely beyond the scope of his employment, if, in obeying the order, such employé

is killed or injured: *Orman v. Mannix*, 17 Colo. 564, 31 Am. St. Rep. 340. The foreman of a paint shop, with power to employ or discharge workmen therein, is a vice-principal: *International etc. Ry. Co. v. Hinzie*, 82 Tex. 623, 630. A foreman who has power to employ, control, and discharge laborers in his department is a vice-principal, and it is his duty to warn them of latent risks in their employment: *Fort Smith Oil Co. v. Slover*, 58 Ark. 168, 179. If the superintendent of railroad construction is absent, and the work is performed under the supervision and direction of a general foreman, who has full power and authority to employ and discharge the workmen, such foreman is, in respect to the workmen, the representative of the railroad company, and not their fellow-servant: *Colorado etc. Ry. Co. v. O'Brien*, 16 Colo. 219, 227. A general foreman of men engaged in railroad construction, such men being subject to his immediate control, employment, and discharge, while he has control of the trains and appliances in the work of construction, subject to the superintending direction of the general superintendent of construction, when present, is a vice-principal during the absence of such superintendent, so as to make the company liable for his negligence toward one of the men under his control and direction: *Colorado etc. Ry. Co. v. Naylor*, 17 Colo. 501, 31 Am. St. Rep. 335.

On the other hand, it is asserted that mere authority or power to control is not the test by which to determine who is a vice-principal; that mere foremanship does not elevate one to the position of vice-principal; that a foreman not clothed with any special power over employes is not a vice-principal; that a foreman, superintendent, or like agent, notwithstanding he may have a supervisory power, is still a fellow-servant, unless some duty of the master has been intrusted to him; and that to constitute a vice-principal the person must represent the master as to some particular duty, or be at the head of a separate and distinct department: *Harley v. Louisville etc. R. R. Co.*, 57 Fed. Rep. 144, 146; *Stockmeyer v. Reed*, 55 Fed. Rep. 259, 262; *Dube v. Lewiston*, 83 Me. 211, 218; *Meyer v. Illinois Cent. R. R. Co.*, 177 Ill. 591; *Capper v. Louisville etc. Ry. Co.*, 103 Ind. 305. According to this line of cases, the foreman, superintendent, or overseer of a job of work, although he may have power to supervise the work and to direct and control the workmen, is still only a fellow-servant, for whose negligence the master is not answerable, where no particular duty of the master has been delegated to him: *Dube v. Lewiston*, 83 Me. 211, 218; *Capper v. Louisville etc. Ry. Co.*, 103 Ind. 305; *Stockmeyer v. Reed*, 55 Fed. Rep. 259; *Cates v. Itner*, 104 Ga. 679; *Coulson v. Leonard*, 77 Fed. Rep. 538; *New Pittsburgh Coal etc. Co. v. Peterson*, 136 Ind. 398, 43 Am. St. Rep. 327; *Olsen v. Nixon*, 61 N. J. L. 671; *Foley v. Chicago etc. Ry. Co.*, 64 Iowa, 644, 650; *Baldwin v. St. Louis etc. Ry. Co.*, 68 Iowa, 37; *Malone v. Hathaway*, 64 N. Y. 5, 21 Am. Rep. 573; *Richmond Locomotive Works v. Ford*, 94 Va. 627; and the fact

that the foreman has power, in addition to such authority, to employ or discharge other employes does not make him a vice-principal: *New Pittsburgh Coal etc. Co. v. Peterson*, 136 Ind. 398, 43 Am. St. Rep. 827; *Minneapolis v. Lundin*, 58 Fed. Rep. 525; *Union Pac. R. R. Co. v. Doyle*, 50 Neb. 555. Thus, if a gang of laborers is employed on one of several buildings being erected by, and under the supervision of, a general contractor, a foreman who has charge of the gang, and personally assists the men, is simply a fellow-servant with such laborers: *Coulson v. Leonard*, 77 Fed. Rep. 538. So, if a general superintendent of street work appoints a superintendent of sewer construction, who has charge of that department of the work and who employs a foreman, giving him control of a gang of men, with power to hire and discharge, and to direct when, where, and how to work, such foreman is not a general vice-principal of the city in relation to a workman under him, who is injured by his negligent act: *Minneapolis v. Lundin*, 58 Fed. Rep. 525. The fact that one employe is vested with authority to hire and discharge a coemploye is not conclusive evidence that, as to such coemploye, he is a vice-principal: *Union Pac. R. R. Co. v. Doyle*, 50 Neb. 555, 561; and the burden is upon an injured servant to show, by allegations in his complaint, that the foreman, whose negligence caused the injury, is a vice-principal and not a fellow-servant: *New Pittsburgh Coal etc. Co. v. Peterson*, 136 Ind. 398, 43 Am. St. Rep. 327.

It has been held, in that class of cases where some duty of the master must be intrusted to a foreman in order to constitute him a vice-principal, that if such duty is delegated to him, he stands, at least to that extent, in the place of the master, and is his vice-principal: *Anderson v. Bennett*, 16 Or. 515, 8 Am. St. Rep. 311; *Eledge v. National City etc. Ry. Co.*, 100 Cal. 282, 38 Am. St. Rep. 290; *Bloyd v. St. Louis etc. Ry. Co.*, 58 Ark. 66, 41 Am. St. Rep. 85; *Noe Roux v. Blodgett etc. Lumber Co.*, 94 Mich. 607; *Louisville etc. Ry. Co. v. Graham*, 124 Ind. 89; *Bradley v. Chicago etc. Ry. Co.*, 138 Mo. 293; *Nixon v. Selby Smelting etc. Co.*, 102 Cal. 458; *Stahl v. Duluth*, 71 Minn. 341, 342; *Higgins v. Williams*, 114 Cal. 176; *Dayharsh v. Hannibal etc. R. R. Co.*, 103 Mo. 570, 23 Am. St. Rep. 900; *Hannibal etc. R. R. Co. v. Fox*, 31 Kan. 586; *Belleville Stone Co. v. Mooney*, 60 N. J. L. 323, 332; *Van Steenburgh v. Thornton*, 58 N. J. L. 100; *Nelson v. Marinette etc. Paper Co.*, 75 Wis. 579, 584; *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447; *Nadan v. White River Lumber Co.*, 70 Wis. 120, 20 Am. St. Rep. 29; *Addicks v. Christoph*, 62 N. J. L. 786, 72 Am. St. Rep. 687; *Sullivan v. Hannibal etc. R. R. Co.*, 107 Mo. 66, 28 Am. St. Rep. 388; *Stockmeyer v. Reed*, 55 Fed. Rep. 259; *Pullman's Palace Car Co. v. Harkins*, 55 Fed. Rep. 932; *Brown v. Sennett*, 68 Cal. 225, 58 Am. Rep. 8; *Chicago etc. R. R. Co. v. May*, 108 Ill. 288, 300; *Borgman v. Omaha etc. Ry. Co.*, 41 Fed. Rep. 667; *Gillmore v. Northern Pac. Ry. Co.*, 18 Fed. Rep. 866. Thus, if the master's personal, positive, absolute

duty to provide or prepare a reasonably safe place in which to work, consistently with the nature of the undertaking, is intrusted to a foreman, the latter is the representative of the master, who is answerable for his negligence in case of injury: *Anderson v. Bennett*, 16 Or. 515, 8 Am. St. Rep. 311; *Elledge v. National City etc. Ry. Co.*, 100 Cal. 282, 38 Am. St. Rep. 290; *Bloyd v. St. Louis etc. Ry. Co.*, 58 Ark. 66, 41 Am. St. Rep. 85; *Noe Roux v. Blodgett etc. Lumber Co.*, 94 Mich. 607; *Louisville etc. Ry. Co. v. Graham*, 124 Ind. 89; *Bradley v. Chicago etc. Ry. Co.*, 138 Mo. 293; *Nixon v. Selby Smelting etc. Co.*, 102 Cal. 458; *Stahl v. Duluth*, 71 Minn. 341, 342; *Higgins v. Williams*, 114 Cal. 176; *Dayharsh v. Hannibal etc. R. R. Co.*, 103 Mo. 570, 23 Am. St. Rep. 900; *Hannibal etc. R. R. Co. v. Fox*, 31 Kan. 586; *Belleville Stone Co. v. Mooney*, 60 N. J. L. 323, 332; *Sullivan v. Hannibal etc. R. R. Co.*, 107 Mo. 66, 28 Am. St. Rep. 388; *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447; as where injury results because the foreman fails to make a sewer trench safe for those employed therein: *Van Steenburgh v. Thornton*, 58 N. J. L. 160; or because he fails to put a key into a pin in a machine, which requires it to make it safe: *Higgins v. Williams*, 114 Cal. 176; or because he extemporizes an insufficient hose in the silver room of a smelting company, whereby acid is discharged upon the shoulder and back of an employé: *Nixon v. Selby Smelting etc. Co.*, 102 Cal. 458; or because he leaves dangerous machinery in a mill uncovered: *Noe Roux v. Blodgett etc. Lumber Co.*, 94 Mich. 607; and see *Pullman's Palace Car Co. v. Harkins*, 55 Fed. Rep. 932; or because he, being a boss car repairer, fails to protect car repairers, working under a car, against danger arising from the switching of cars and making up of trains on the same track: *Hannibal etc. R. R. Co. v. Fox*, 31 Kan. 586. If a workman is put to work alongside a cliff or embankment of stone which he believes to be solid and secure, but which the foreman knows to be insecure and dangerous, and injury is suffered by the workman, the master is answerable, because it is his duty to furnish his employées a reasonably safe place in which to work: *Elledge v. National City etc. Ry. Co.*, 100 Cal. 282, 38 Am. St. Rep. 290. See, also, *Bradley v. Chicago etc. Ry. Co.*, 138 Mo. 293; and compare *Richmond Locomotive Works v. Ford*, 94 Va. 627, 644, showing that, if the place is reasonably safe in the first instance, but is afterward rendered unsafe by the negligent manner in which the foreman directs the work to be done, the master is not answerable for an injury arising during such negligent performance. In cases where the facts are in dispute, the question as to whether the master has done his duty respecting a safe place in which to work, and whether an employé acted as a vice-principal, is one for the jury, under proper instructions: *Bradley v. Chicago etc. Ry. Co.*, 138 Mo. 293, 306; *Hill v. Winston*, 73 Minn. 80; *Railway Co. v. Hammond*, 58 Ark. 324.

A foreman represents the master, who is answerable for his negligence in case of injury, where such foreman orders a young and inexperienced employé to wipe the gearings of a paper machine while in motion: *Nellon v. Marinette etc. Paper Co.*, 75 Wis. 579; or where he orders a laborer to use a defective staging, while removing a railroad company's building: *Sullivan v. Hannibal etc. R. R. Co.*, 107 Mo. 66, 28 Am. St. Rep. 888; or where he, being in charge of stevedores, neglects to give a required signal while supervising and controlling the unloading of a vessel: *Brown v. Sennett*, 68 Cal. 225, 58 Am. Rep. 8. A foreman in charge of a wrecking train represents the railroad company: *Wabash etc. Ry. Co. v. Hawk*, 121 Ill. 269, 2 Am. St. Rep. 82; *Borgman v. Omaha etc. Ry. Co.*, 41 Fed. Rep. 667. So a foreman's act in picking at a pile of ore beside which he has set a laborer at work, so as to loosen the support of the upper part of it and cause the ore to fall upon the workman, is the conduct of the master and not that of a fellow-servant: *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447. And when a foreman orders a laborer from the place where he is at work and directs him to work in a place of unusual danger, the foreman, in giving such order, is a vice-principal, and the master is liable for his negligence, which results in injury: *Carlson v. Northwestern etc. Co.*, 63 Minn. 428.

The foreman of a master is also guilty of negligence, in failing to warn his coemployés of dangers existing or occurring during the course of the work, where ordinary care requires him to give such warning, and where he has knowledge of the inexperience of the employés. Particularly is this true in the case of infant servants. The foreman's duty to give such warning is that of the master, who is answerable for his negligence in case of injury: *Belleville Stone Co. v. Mooney*, 60 N. J. L. 323, 332; *Stahl v. Duluth*, 71 Minn. 341, 342; *Pullman's Palace Car Co. v. Harkins*, 55 Fed. Rep. 932; *Turner v. Goldsboro Lumber Co.*, 119 N. C. 387; *Nadau v. White River Lumber Co.*, 76 Wis. 120, 20 Am. St. Rep. 29; *Andreson v. Ogden etc. Depot Co.*, 8 Utah, 128; *Hannibal etc. R. R. Co. v. Fox*, 31 Kan. 586; *Gilmore v. Northern Pac. Ry. Co.*, 18 Fed. Rep. 866; *Foley v. California Horseshoe Co.*, 115 Cal. 184, 56 Am. St. Rep. 87; *Addicks v. Christoph*, 62 N. J. L. 786, 72 Am. St. Rep. 687; as where the foreman in charge of a squad of laborers fails to put out flags or danger signals, on a railroad track, especially when required by the rules of the company, to warn approaching trains of their presence on the track: *Richmond etc. R. R. Co. v. Hammond*, 93 Ala. 181; or fails to warn laborers, working under an embankment, of the danger of the earth falling, where he has been accustomed to give such warning: *Andreson v. Ogden etc. Depot Co.*, 8 Utah, 128; or fails to warn workmen in a stone quarry to seek safety from the explosion of a blast: *Belleville Stone Co. v. Mooney*, 60 N. J. L. 323; *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447; or directs a laborer to assist in thawing out giant powder with-

out a safe appliance, called a "heater," for the purpose: *Gilmore v. Northern Pac. Ry. Co.*, 13 Fed. Rep. 886; or directs a workman to leave one part of a work and go to another, and there pick up and remove loose rock at and around a hole in which there is an unexploded charge of dynamite: *Stahl v. Duluth*, 71 Minn. 341, 342. The foreman of a master is guilty of negligence, when he has knowledge of the inexperience of an employé, and fails to point out to him the dangers of his employment when he employs him, and the negligence of the foreman in this respect is the negligence of the master: *Nadau v. White River Lumber Co.*, 76 Wis. 120, 20 Am. St. Rep. 29. The foreman must warn a laborer of latent defects or hazards incident to the latter's occupation: *Turner v. Lumber Co.*, 119 N. C. 387; and the duty devolving upon a master to explain to a minor employé the hazards of the service, and to instruct him how to avoid them, cannot be delegated to a foreman, so as to exonerate the master from liability for a failure to perform it, on the ground that such foreman was a fellow-servant with the injured minor employé: *Addicks v. Christoph*, 62 N. J. L. 786, 72 Am. St. Rep. 687. So, between an assistant foreman and a boy subject to his orders, the relation of fellow-servants does not exist so as to relieve the employer from liability for injuries received by the boy from obeying the orders of such foreman: *Foley v. California Horse-shoe Co.*, 115 Cal. 184, 56 Am. St. Rep. 87.

A foreman is also a vice-principal and represents the master in the duty of selecting safe and proper appliances and machinery for workmen, and the master is answerable for the foreman's negligent performance of this duty: *Thomas v. Ann Arbor R. R. Co.*, 114 Mich. 59; *Lund v. Hersey Lumber Co.*, 41 Fed. Rep. 202; *Telander v. Sunlin*, 44 Fed. Rep. 564, 569; *Lehigh Valley Coal Co. v. Warrek*, 84 Fed. Rep. 866; *Houston v. Brush*, 66 Vt. 331; *Boelter v. Ross Lumber Co.*, 103 Wis. 324; *Richmond Granite Co. v. Bailey*, 92 Va. 554; as where he, being in charge of employés, undertakes to select suitable materials from a supply in a warehouse, eighty miles distant from the scene of work: *Thomas v. Ann Arbor R. R. Co.*, 114 Mich. 59; or to select ropes for the purpose of removing a barge from the water: *Lund v. Hersey Lumber Co.*, 41 Fed. Rep. 202; or to furnish blocks and tackle for raising and lowering a heavy piece of iron: *Telander v. Sunlin*, 44 Fed. Rep. 564; or fails to furnish reasonably safe tools for work: *Lehigh Valley Coal Co. v. Warrek*, 84 Fed. Rep. 866; or fails to furnish a suitable tackle block for a derrick, and to keep it in repair: *Houston v. Brush*, 66 Vt. 331; or fails to provide a suitable and safe wagon for the purposes of a particular work: *Boelter v. Ross Lumber Co.*, 103 Wis. 324; or fails to establish and promulgate rules when necessary for the protection and safety of workmen: *Richmond Granite Co. v. Bailey*, 92 Va. 554; or directs a laborer to use a defective staging: *Sullivan v. Hannibal etc. R. R. Co.*, 107 Mo. 68, 28 Am. St. Rep. 888.

If the entire management and control of a business is intrusted to a foreman, the latter represents the employer, who is answerable

for the foreman's negligence which results in injury: *Brown v. Gilchrist*, 80 Mich. 56, 20 Am. St. Rep. 496; *Lewis v. Selfert*, 116 Pa. St. 628, 2 Am. St. Rep. 631; *Slater v. Chapman*, 67 Mich. 523, 11 Am. St. Rep. 593; *Ingerman v. Moore*, 90 Cal. 410, 25 Am. St. Rep. 188; *Schultz v. Chicago etc. Ry. Co.*, 48 Wis. 375; as where the foreman in charge of a crew of men, worked with a pile driver in a dangerous condition, when he knew that the machine was out of order and had time to repair it before an injury occurred: *Schultz v. Chicago etc. Ry. Co.*, 48 Wis. 375. A foreman who has charge of his employer's freight and coal business and the unloading of vessels laden with coal, as well as the absolute power to employ, direct, and control the other men employed in the master's business, is not a fellow-servant with them, so as to relieve the master from liability for the negligence of the foreman in performing the duties within the scope of his employment. The foreman, in such a case, represents the master, who cannot say, where a workman was injured by the giving away of a scaffold or platform made of rotten and unsound timbers and material: "The foreman whom I employed was selected with care and for his fitness for the work intrusted to him. I pointed out to him all necessary and proper material; and, therefore, though he did not make a proper selection of material, and did not build a safe structure, my hands are clean, and no responsibility rests with me. I have discharged the full measure of my duty to the men whom he guides and controls": *Brown v. Gilchrist*, 80 Mich. 56, 20 Am. St. Rep. 496. So the fact that the owner of a sawmill did not manage the mill in person, and did not personally employ or have communication with a servant injured while at work upon dangerous machinery, does not absolve him from liability for the negligence of his foreman or superintendent in putting the servant at work without proper instructions: *Ingerman v. Moore*, 90 Cal. 410, 25 Am. St. Rep. 188. And where a foreman has the whole charge of the erection and construction of a building, and exercises full control over it in the place of his employer, the negligence of the foreman is the negligence of the employer, who is liable therefor, whether he knew that the foreman was careless or incompetent or not, provided the workman injured was not in fault, but used due care and caution: *Slater v. Chapman*, 67 Mich. 523, 11 Am. St. Rep. 593.

A vice-principal, so long as he acts in discharge of the duties which the principal owes to his employes, represents the principal, so that his act is the act of the principal. Beyond this, he acts only as a workman, and not as a vice-principal: *Boss v. Walker*, 139 Pa. St. 42, 23 Am. St. Rep. 160; *Dube v. Lewiston*, 83 Me. 211; *Cullen v. Norton*, 126 N. Y. 1; *New Pittsburgh Coal etc. Co. v. Peterson*, 136 Ind. 398, 43 Am. St. Rep. 327; *Capper v. Louisville etc. Ry. Co.*, 108 Ind. 305; *Stockmeyer v. Reed*, 55 Fed. Rep. 259, 262; *Olsen v. Nixon*, 61 N. J. L. 671; *Lindvall v. Woods*, 41 Minn. 212; *Galveston etc. Ry. Co. v. Farmer*, 73 Tex. 85; *O'Brien v. American Dredging Co.*,

53 N. J. L. 201, 290; *Railway Co. v. Torrey*, 58 Ark. 217; as where a foreman is assisting to repair a car: *Holtz v. Great Northern Ry. Co.*, 69 Minn. 524; or where a foreman carelessly drops a book: *Frawley v. Sheldon*, 20 R. I. 258; or where the act is one of labor in common with other servants: *Railway Co. v. Torrey*, 58 Ark. 217; *Olsen v. Nixon*, 61 N. J. L. 671; or where the negligent act was a part performance of the work itself: *Cullen v. Norton*, 126 N. Y. 1, 7, which was a case of injury from a blast, causing death. A "boss wiper" of a gang of wipers, employed by a railroad company to wipe its locomotives, does not, in the discharge of his duties, represent the master as to the wipers, but is their fellow-servant, although he is their foreman and directs them when and where to work: *Knox v. Railroad*, 101 Tenn. 375. Mere superiority as a foreman in the work of moving cars does not make one a vice-principal; and the foreman of a gang of laborers, who is himself under the management and control of a superintendent, is a fellow-servant of the persons working under and with him: *Moore Lime Co. v. Richardson*, 95 Va. 326, 64 Am. St. Rep. 785. For further illustrations showing when a foreman is a vice-principal, see subdivisions, "Conductors of Railway Trains," *supra*, and "Mining Employés," "Section Bosses or Foremen," "Superintendents," and "Managers or Superintendents of Departments," *infra*.

Inspectors and Repairers—Machinists.—As an obligation rests on a master to furnish suitable machinery, and to keep the same in repair, he is answerable for the negligence of those persons in his service on whom he has devolved the duty of inspecting machinery and appliances, and seeing that they are kept in a proper condition for use; and, in conformity with this principle, the better opinion seems to be that a railroad company's car inspector, whose duty it is to inspect machinery, brakes, and cars, represents the company, so far as that duty is concerned, and his negligence is its negligence. Hence, the railroad company is answerable for the negligence of its inspector, whereby injury results, whether the injured employé is a brakeman: *International etc. Ry. Co. v. Kernan*, 78 Tex. 294, 22 Am. St. Rep. 52; *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439, 10 Am. St. Rep. 67; *Long v. Pacific R. R.*, 65 Mo. 225; *Carpenter v. Mexican Nat. R. R. Co.*, 39 Fed. Rep. 315; *Morton v. Detroit etc. R. R. Co.*, 81 Mich. 423; *Terre Haute etc. Co. v. Mansberger*, 65 Fed. Rep. 196; 67 Fed. Rep. 67; *Missouri Pac. Ry. Co. v. Dwyer*, 36 Kan. 58; *Brann v. Chicago etc. R. R. Co.*, 58 Iowa, 595, 36 Am. Rep. 243; *Condon v. Missouri Pac. Ry. Co.*, 78 Mo. 567; *Fay v. Minneapolis etc. Ry. Co.*, 30 Minn. 231; *Daniels v. Union Pac. Ry. Co.*, 6 Utah, 357; *Felton v. Bullard*, 94 Fed. Rep. 781; a train conductor: *Cameron v. Great Northern Ry. Co.*, 8 N. Dak. 124, 128, 131; a station agent: *Chicago etc. R. R. Co. v. Kellogg*, 54 Neb. 127; a car coupler: *Tierney v. Minneapolis etc. R. R. Co.*, 33 Minn. 311, 53 Am. Rep. 35; or a switchman: *Little Rock etc. R. R. Co. v. Moseley*, 56 Fed. Rep. 1009; or whether the injury occurred by reason of a defective car and coupling apparatus: *International etc. Ry. Co. v.*

Kernan, 78 Tex. 294, 22 Am. St. Rep. 52; Little Rock etc. R. R. Co. v. Moseley, 56 Fed. Rep. 1009; defects in brake: Long v. Pacific R. R., 65 Mo. 225; Chicago etc. R. R. Co. v. Kellogg, 54 Neb. 127; the breaking of a brake-chain: Morton v. Detroit etc. R. R. Co., 81 Mich. 423; or a defective brake-staff: Missouri Pac. Ry. Co. v. Dwyer, 36 Kan. 58; and it is immaterial that the defective car used by the company belonged to another company, or that it was a foreign car: International etc. Ry. Co. v. Kernan, 78 Tex. 294, 22 Am. St. Rep. 52; Fay v. Minneapolis etc. Ry. Co., 30 Minn. 231; Louisville etc. Ry. Co. v. Bates, 146 Ind. 564; Felton v. Ballard, 94 Fed. Rep. 781. Persons whose duty it is to inspect the timbers in a railroad bridge represent the company, which is answerable for their negligence: Chicago etc. Ry. Co. v. Healy, 86 Fed. Rep. 245, 249. A railway brakeman can maintain an action against the corporation for an injury sustained through its negligence to have its cars inspected: Bram v. Chicago etc. R. R. Co., 53 Iowa, 595, 36 Am. Rep. 248; and compare Northern Pac. R. R. Co. v. Herbert, 116 U. S. 642; and where a railroad employé is injured by the neglect of a car inspector, the company cannot exonerate itself from liability by setting up that its car inspector and the servant injured by his neglect were fellow-servants: Macy v. St. Paul etc. R. R. Co., 35 Minn. 209.

On the contrary, however, there is much authority showing that car inspectors are only fellow-servants with brakemen and other railroad employes: See St. Louis etc. Ry. v. Gaines, 48 Ark. 955; Dewey v. Detroit etc. Ry. Co., 97 Mich. 329, 37 Am. St. Rep. 348; Nashville etc. Ry. v. Foster, 10 Lea, 351; Railroad Co. v. Fitzpatrick, 42 Ohio St. 318; Smith v. Flint etc. Ry. Co., 46 Mich. 258, 41 Am. Rep. 161; Wonder v. Baltimore etc. R. R. Co., 32 Md. 411, 8 Am. Rep. 143; Philadelphia etc. R. R. Co. v. Hughes, 119 Pa. St. 301; and that the appointment of competent inspectors will exonerate the master from liability: Byrnes v. New York etc. R. R. Co., 118 N. Y. 251; Philadelphia etc. R. R. Co. v. Hughes, 119 Pa. St. 301, 314; Smith v. Flint etc. Ry. Co., 46 Mich. 258, 41 Am. Rep. 161; Kelley v. Norcross, 121 Mass. 508; Mackin v. Boston etc. R. R., 185 Mass. 201, 46 Am. Rep. 453. It has been held, in Michigan, that the duty of a railroad company to furnish its servants with a reasonably safe place to work cannot be extended so as to make it liable for injuries which a brakeman receives through the negligence of a car inspector in not observing that a car is improperly loaded, when it is to be put into a train for transportation: Dewey v. Detroit etc. Ry. Co., 97 Mich. 329, 37 Am. St. Rep. 348. Compare the extended notes to Tierney v. Minneapolis etc. R. R. Co., 53 Am. Rep. 45-47; Fisk v. Central Pac. R. R. Co., 1 Am. St. Rep. 31-33, showing who are, and who are not, fellow-servants.

A car repairer is not a fellow-servant with a foreman of car repairers, with power to employ and discharge servants under him, and the company is liable for an injury to such car repairer received through the negligence of such foreman and while engaged in extra-

hazardous employment under his order and promise of protection: *Missouri Pac. Ry. Co. v. Williams*, 75 Tex. 4, 16 Am. St. Rep. 867. The foreman represents the company; and so with a car inspector, whose duty it is to keep brakes in repair: *Chicago etc. R. R. Co. v. Kellogg*, 54 Neb. 127.

Agents charged with the duty of procuring safe machinery, or agents charged with the duty of inspecting and keeping machinery and appliances in suitable repair, are not to be regarded as fellow-servants with those employed to labor in the business wherein such machinery and appliances are used, or, in some cases, even with those engaged to operate the same. Such agents are, in legal effect, vice-principals, and the master is liable for injuries resulting, without contributory negligence, to other servants, through the ordinary negligence of his employé or agent thus charged with the duty of procuring or repairing, whether such negligence be in originally failing to purchase safe machinery or appliances, or in failing to keep the same in proper condition for use: *Wells v. Coe*, 9 Colo. 159; *Denver Tramway Co. v. Crumbaugh*, 23 Colo. 363; *Atchison etc. R. R. Co. v. McKee*, 37 Kan. 592; *Brann v. Chicago etc. R. R. Co.*, 53 Iowa, 595, 36 Am. Rep. 243; *Van Dusen v. Letellier*, 78 Mich. 492; *Beelter v. Ross Lumber Co.*, 103 Wis. 324, 329; *Cooper v. Pittsburgh etc. R. R. Co.*, 24 W. Va. 37; *Chicago etc. Ry. Co. v. Healy*, 86 Fed. Rep. 245; *Kelly v. Erie etc. Tel. Co.*, 34 Minn. 321; *Atchison etc. R. R. Co. v. Holt*, 29 Kan. 149, 156; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140, 3 Am. St. Rep. 92; *Taylor v. Evansville etc. R. R. Co.*, 121 Ind. 124, 16 Am. St. Rep. 372; *Houston etc. Ry. Co. v. O'Hare*, 64 Tex. 600; *Shanny v. Andrescoggin Mills*, 66 Me. 420; *Cumberland etc. R. R. Co. v. State*, 44 Md. 283; *Flike v. Boston etc. R. R. Co.*, 53 N. Y. 549, 13 Am. Rep. 545; *Hough v. Railway Co.*, 100 U. S. 213. This rule applies not only to machinery and appliances for railroad companies: *Houston etc. Ry. Co. v. O'Hare*, 64 Tex. 600; *Cooper v. Pittsburgh etc. R. R. Co.*, 24 W. Va. 37; *Atchison etc. R. R. Co. v. Holt*, 29 Kan. 149; *Cumberland etc. R. R. Co. v. State*, 44 Md. 283; *Flike v. Boston etc. R. R. Co.*, 53 N. Y. 549, 13 Am. Rep. 545; but extends to all classes of business: *Houston etc. Ry. Co. v. O'Hare*, 64 Tex. 600; such as a sawmill business: *Van Dusen v. Letellier*, 78 Mich. 492; or manufacturing establishment: *Atchison etc. R. R. Co. v. McKee*, 37 Kan. 592. Machinists who defectively repair a company's dynamo department act in the place of the master, and if the company's superintendent, who had nothing to do with the repairs, is injured by reason of such defective repairing, the company is answerable: *Swift v. Short*, 92 Fed. Rep. 567. It is held in Massachusetts that a master's duty to provide his servant with safe machinery cannot be discharged by delegating its performance to another; and that if he employs agents or servants to represent him in performing this duty, they are to that extent agents or servants for whose conduct he is answerable, and for whose negligence his other servants may recover if injured thereby: *Moynihan v. Hills*

Co., 146 Mass. 586, 4 Am. St. Rep. 848. Thus, it was held in *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240, 14 Am. Rep. 598, that one employed by a railroad corporation to drive a locomotive engine over its road may recover damages against the corporation for personal injuries caused by a defect in the engine, which was due to the neglect of the agents of the corporation charged with keeping the engine in proper repair, although the directors and superintendent had no reason to suspect negligence or incompetency on the part of such agents. A master is, of course, not answerable for the act of an employé in directing the use of unsafe machinery, where it is not shown that the latter had authority to direct what machinery or appliances should be used: *Wilson v. Dunreath etc. Quarry Co.*, 77 Iowa, 429, 14 Am. St. Rep. 804; nor is a railway company liable for an injury to a servant injured while at work with machinery, where the company's foreman, laboring with him at the time, was doing the work of a fellow-servant, and not acting as a vice-principal: *Kerner v. Baltimore etc. Ry. Co.*, 149 Ind. 21. Compare *Hathaway v. Illinois Cent. Ry. Co.*, 92 Iowa, 337. Compare the subdivision, "Master's Duties," supra.

Managers or Superintendents of Departments.—An employé invested with the sole charge of a branch or department of the employer's business, and whose duties are not those of a mere workman, but those of one whose duty it is to manage a distinct department, and to give orders to other employés as to the duties they should perform, is not a fellow-servant of such other employés, but a vice-principal, while he is engaged in giving orders or directing their execution, and the master is answerable for his negligence: *Taylor v. Evansville etc. R. R. Co.*, 121 Ind. 124, 16 Am. St. Rep. 372; *Libby v. Scherman*, 146 Ill. 540, 37 Am. St. Rep. 191; *Palmer v. Michigan Cent. R. R. Co.*, 93 Mich. 363, 32 Am. St. Rep. 507; *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409, 19 Am. St. Rep. 180; *Denver etc. R. R. Co. v. Driscoll*, 12 Colo. 520, 13 Am. St. Rep. 243; *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711; *Chicago etc. R. R. Co. v. Sullivan*, 27 Neb. 673; *Cook v. St. Paul etc. Ry. Co.*, 34 Minn. 45; *New York etc. R. R. Co. v. Bell*, 112 Pa. St. 400; *Mullan v. Philadelphia etc. Steamship Co.*, 78 Pa. St. 25, 21 Am. Rep. 2; *Chicago etc. R. R. Co. v. May*, 108 Ill. 288; *Hunn v. Michigan Cent. R. R. Co.*, 78 Mich. 513; *Doughty v. Penobscot Log etc. Co.*, 76 Me. 143; *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447; *Brabbitts v. Chicago etc. Ry. Co.*, 38 Wis. 289, 298; *Fort Smith Oil Co. v. Slover*, 58 Ark. 168. As was said in *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447, 456: "Where a corporation authorizes one of its employés to have the control over a particular class of workmen in any branch of its business, such employé is quoad hoc the direct representative of the company. The commands which he gives within the scope of his authority are the commands of the company itself, and, if such commands are not unreasonable, those under his charge are bound to obey at the peril of losing their situations. Hence, the company will be held respon-

sible for the consequences." The rule of vice-principal, however, is not confined to departments of service, but applies to any special business of the master which is carried on by a number of employes, under the charge of another, who has power to represent the master: *Fort Worth etc. Ry. Co. v. Peters*, 87 Tex. 222; and even the foreman of a department may be a fellow-servant of the men under him as to all acts which it is not the duty of the master to perform, as where he, being in charge of a factory, works with the men under him: *Findlay v. Russell etc. Foundry Co.*, 108 Mich. 286.

Much perplexity as to the departmental doctrine seems to have been caused by the case of *Chicago etc. Ry. Co. v. Ross*, 112 U. S. 377, holding a railroad corporation answerable in damages to a locomotive engineer, in the employment of the company, for injuries received in a collision which was caused by the negligence of the conductor of the train drawn by the engine upon which the plaintiff was engineer. The action was held to be maintainable on the ground that the conductor, upon the occasion in question, was an agent of the corporation, clothed with the control and management of a distinct department, in which his duty was entirely that of direction and superintendence; that he had the entire control and management of the train, occupying a very different position from the brakemen, porters, and other subordinates employed on it; that he was in fact and should be treated as a personal representative of the corporation for whose negligence the corporation was responsible to subordinate servants. But this case has been criticised, discussed, commented upon, and explained in many cases: See *Harley v. Louisville etc. R. R. Co.*, 57 Fed. Rep. 144, 148; *Coulson v. Leonard*, 77 Fed. Rep. 538, 539; *Grattis v. Kansas City etc. R. R. Co.*, 153 Mo. 380, 401; *Northern Pac. R. R. Co. v. Hambly*, 154 U. S. 849, 858; *Northern Pac. R. R. Co. v. Peterson*, 162 U. S. 346, 354. It has also been expressly overruled in so far as it holds that a conductor, merely from his position as such, is a vice-principal: *New England R. R. Co. v. Conroy*, 175 U. S. 323, 343; *Baltimore etc. R. R. Co. v. Baugh*, 149 U. S. 368. But whatever difference of opinion there may be as to the classification of service into departments, and as to what constitutes a separate and distinct department, we do not understand that the principle applied in *Chicago etc. Ry. Co. v. Ross*, 112 U. S. 377, has been disturbed. That principle is, that if the business of the master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employes under them, vice-principals, representatives of the master, as fully and as completely as if the entire business of the master was by him placed under the charge of one superintendent. This rule can only be fairly applied, of course, where the different branches or departments of service are in and of themselves separate and distinct, for

It cannot be affirmed that each separate piece of work in one branch of service is a distinct department, and that the individual having control of that piece of work occupies the position of vice-principal or representative of the master: See remarks of Mr. Justice Brewer in *Baltimore etc. R. R. Co. v. Baugh*, 149 U. S. 368, 383. It is undoubtedly the duty of an agent in charge of a department, as well as of one who has no such charge, but who still represents the master, to perform the personal, positive, absolute duties of the master, as previously enumerated in this note: See *Baltimore etc. R. R. Co. v. Baugh*, 149 U. S. 368, 386; *Northern Pac. R. R. Co. v. Peterson*, 162 U. S. 346, 353; *New England R. R. Co. v. Conroy*, 175 U. S. 323, 339. And we do not understand that any of these cases deny the doctrine announced in the first sentence of the present subdivision of this note, where the business naturally and clearly separates itself into departments of service. Compare the subdivision, "Master's Liability," supra.

A *Master Mechanic* of a railroad company who has entire control of its shop, men, machinery, and work, with full authority to employ and discharge workmen and to select and change the machinery, is not the fellow-servant of a machinist in the company's employ, to whom he gives a specific order for the execution of certain work, which order the machinist is bound to obey, but is the representative of the master, and if, through the negligence of such master mechanic, the machinist is injured while performing the work, the company is liable: *Taylor v. Evansville etc. R. R. Co.*, 121 Ind. 124, 16 Am. St. Rep. 372. The company is also answerable for injury caused by the order of its division master mechanic, under which a tender belonging to one engine is attached to another of different construction, thus rendering the use of the locomotive dangerous; and if a fireman, engaged in shoveling coal into the firebox, is killed by the parting of the engine and tender, the company is liable, for the master mechanic, representing the company, provided an unsafe place to work and unsafe machinery and appliances: *Krueger v. Louisville etc. Ry. Co.*, 111 Ind. 51.

A *Millwright* employed to make repairs and alterations about a mill and a sawyer engaged in operating a saw therein are not fellow-servants; but the millwright represents the master and, under the rule that the master cannot escape liability by delegating his personal duties to another, the master is answerable for the negligent act of the millwright in leaving a heavy chisel on a beam, from which it was jarred by the vibration of the machinery, causing it to fall and to injure the sawyer: *Hammarberg v. St. Paul etc. Lumber Co.*, 19 Wash. 537, 543.

Mining Bosses, Employés and Foremen.—The superintendent of a mine, who has general and entire charge of the work, employs and discharges workmen, and directs their duties and employments, is, in legal effect, a representative of the master, who is answerable for his neglect of duty: *Reddon v. Union Pac. Ry. Co.*, 5 Utah, 344,

353; Consolidated Coal Co. v. Wombacher, 134 Ill. 57; a mining captain, having entire and absolute management of the mine, independently of the owner, is not a fellow-servant of the other employes, but is, in legal effect, a representative of the master, who is liable for his negligence, through which other employes are injured, although he was not appointed directly by the owner, but by the latter's agent: Ryan v. Bagaley, 50 Mich. 179, 45 Am. Rep. 35. A foreman for a mining company who has full control of the property, employes, tools, materials, and complete charge of the management and development of the mine is a vice-principal of the corporation, which is answerable for his negligence in not sufficiently timbering a tunnel: Kelley v. Fourth of July Min. Co., 16 Mont. 484, 503. So an underground foreman in a mine, who has entire charge of the mine underground, is not a fellow-servant of those working under his directions, such as a timberman of the mine, but represents the master, who is answerable for his negligence: Cunningham v. Union Pac. Ry. Co., 4 Utah, 206; Tribay v. Brooklyn etc. Min. Co., 4 Utah, 468. It is the duty of a master to make timely inspections of the timbers, walls, and roof of his mine, and when he, instead of performing this duty in person, delegates it to a servant, then such servant stands in the place of the master, and his negligence is the negligence of the master: Western etc. Min. Co. v. Ingraham, 70 Fed. Rep. 219. Compare Grant v. Varney, 21 Colo. 329.

A mine boss is not a fellow-servant when discharging the nonassignable duties of the master as to a safe place to work, etc.: Russell Creek Coal Co. v. Wells, 96 Va. 416, 422; and if a "shift boss" in a mine, whose duty it is to direct miners where to work, knows of a concealed danger in the mine, such as an unexploded blast of dynamite, but puts a miner ignorant of such danger at work in the place where such danger is concealed, without notifying him of it, and the miner is unable, with ordinary care, to ascertain such danger, the master is liable for an injury to the miner caused by an explosion of the blast while he is at work in such place, although his own act caused it to go off, as the shift boss plainly and palpably acted in the capacity of master in directing the miner to work there: McMahon v. Ida Min. Co., 95 Wis. 306, 60 Am. St. Rep. 117. So if a pit boss assumes the duty of looking after the safety of the roof of a room in a coal mine, so that a servant may give his entire attention to the running of a cutting-machine, without stopping to test the roof, as usual, the failure to discharge such duty is not the negligence of a fellow-servant, but the disregard of an obligation of the master: Westville Coal Co. v. Schwartz, 177 Ill. 272, 279. And a miner charged with the duty of going through a mine from time to time and inspecting it, to determine whether it is free from gas, is discharging a personal duty of the master. He is, therefore, while thus engaged not a fellow-servant of the other miners, but is, in legal effect, a vice-principal: Gowen v. Bush, 76 Fed. Rep. 349, 352. A master's duty to ventilate coal mines cannot be delegated

to a servant so as to relieve the master from liability for injuries caused to another servant by its omission: *Sommer v. Carbon Hill Coal Co.*, 89 Fed. Rep. 54.

But a mining employé, while discharging duties affecting the mere administration of work to be done in a mine, is only a fellow-servant with his coemployés: *Russell Creek Coal Co. v. Wells*, 98 Va. 416. Thus, a chamber roof repairer and a pit boss are fellow-servants: *Fosburg v. Phillips Fuel Co.*, 93 Iowa, 54. So with a "fire boss" and miners over whom he has no control: *Morgan v. Carbon Hill Coal Co.*, 6 Wash. 577; and those in charge of ventilating fans, gas testers, the pit boss, and outside boss of a coal mine, where they have no authority over the miners, are all fellow-servants with the latter: *Hughes v. Oregon Imp. Co.*, 20 Wash. 294. The foreman of a mine and a miner employed to work under his direction have been held to be fellow-servants: *Stephens v. Doe*, 73 Cal. 26; and the inside foreman of a mine to be a fellow-servant of the miners: *Lineoski v. Susquehanna Coal Co.*, 157 Pa. St. 153. A foreman in a coal mine, subject to the orders of a pit boss and the superintendent, is the fellow-servant of a laborer under his direction: *What Cheer Coal Co. v. Johnson*, 56 Fed. Rep. 810. In case of conflicting evidence, it is properly left to the jury to say whether an employé acting in a certain capacity was a fellow-servant: *Alaska Treadwell Gold Min. Co. v. Whelan*, 64 Fed. Rep. 462. Compare *Coal etc. Co. v. Clay*, 51 Ohio St. 542; *Weaver v. Iselin*, 161 Pa. St. 388.

Officer of Ship.—The negligence of the master, or chief officer who acts in the master's place, to provide safe appliances for the use of seamen, and the deliberate use of rigging or methods plainly unsafe, affects both ship and owners with liability for the consequent damage, for it is not the negligence of a fellow-laborer, but that of the master: *The Julia Fowler*, 49 Fed. Rep. 277; *The A. Heaton*, 43 Fed. Rep. 592. The master of a ship represents the owners, who are answerable for his negligence in rendering care or medical aid to sick or injured seamen: *Scarff v. Metcalf*, 107 N. Y. 211, 1 Am. St. Rep. 807.

Railroad Employés in General.—If a servant of a railway company is intrusted with a duty that belongs to his principal as a primary duty, he is, in legal effect, a vice-principal or representative of the master, who is answerable for his negligence, whereby another servant is injured: *Chicago etc. R. R. Co. v. Kneirim*, 152 Ill. 259, 43 Am. St. Rep. 259; *Flannegan v. Chesapeake etc. Ry. Co.*, 40 W. Va. 436, 52 Am. St. Rep. 806; *Drymala v. Thompson*, 26 Minn. 40; *Fay v. Minneapolis etc. Ry. Co.*, 30 Minn. 231; *Chicago etc. R. R. Co. v. Avery*, 109 Ill. 314; *Houston etc. Ry. Co. v. Dunham*, 49 Tex. 181; *Miller v. Southern Pac. Co.*, 20 Or. 285; *Fisher v. Oregon etc. Ry. Co.*, 22 Or. 533; *Torian v. Richmond etc. R. R. Co.*, 84 Va. 192; *Hough v. Railway Co.*, 100 U. S. 213; *Northern Pac. R. R. Co. v. Herbert*, 116 U. S. 642; *Northern Pac. R. R. Co. v. Peterson*, 163

U. S. 846; whether such negligence consists in a failure to make and keep the cars, track, and roadbed safe: Flannegan v. Chesapeake etc. Ry. Co., 40 W. Va. 436, 52 Am. St. Rep. 896; Drymala v. Thompson, 26 Minn. 40; Fay v. Minneapolis etc. Ry. Co., 30 Minn. 231; Chicago etc. R. R. Co. v. Avery, 109 Ill. 314; Houston etc. Ry. Co. v. Dunham, 49 Tex. 181; Miller v. Southern Pac. Co., 20 Or. 285; Fisher v. Oregon etc. Ry. Co., 22 Or. 533; Brunell v. Southern Pac. Co., 34 Or. 256, 259; Snow v. Housatonic R. R. Co., 8 Allen, 441, 85 Am. Dec. 720; O'Donnell v. Allegheny Valley R. R. Co., 59 Pa. St. 239, 98 Am. Dec. 336; Torian v. Richmond etc. R. R. Co., 34 Va. 192; or in a failure to provide other suitable and safe instrumentalities for conducting railroad business: Miller v. Southern Pac. Co., 20 Or. 285; Drymala v. Thompson, 26 Minn. 40; Fay v. Minneapolis etc. Ry. Co., 30 Minn. 231; Chicago etc. R. R. Co. v. Avery, 109 Ill. 314. As was held in Flannegan v. Chesapeake etc. Ry. Co., 40 W. Va. 436, 52 Am. St. Rep. 896, a railway corporation owes to its employes the duty of providing a safe place in which to work. This includes the keeping of a clear track over which to run the trains on which they serve, and the corporation cannot relieve itself from liability to its employes by placing the entire charge of this branch of business in the hands of a subordinate. Such a subordinate is a vice-principal, and an employe injured through his negligence may recover of the common employer. A general foreman of men engaged in railroad construction, such men being subject to his immediate control, employment, and discharge, while he has control of the trains and appliances used in the work of construction, subject to the superintending direction of the general superintendent of construction when present, is a vice-principal during the absence of such superintendent, so as to make the company liable for his negligence toward one of the men under his control and direction: Colorado etc. Ry. Co. v. Naylor, 17 Colo. 501, 31 Am. St. Rep. 335. So, if a railroad employe intrusted with the duty of saving a bridge threatened by a freshet calls out the employes from the various departments of the railroad company's service, in pursuance of the authority conferred upon him, to unite in saving the bridge, chooses the place for them to work, and directs what appliances they shall use, he represents the master, and is, in legal effect, a vice-principal: Nall v. Louisville etc. Ry. Co., 129 Ind. 260, 267.

The duty which a railroad company owes to its employes to provide proper means, facilities, and appliances for carrying on railroad work in reasonable safety cannot be delegated to any subordinate, so as to exempt the company from liability to an employe if injury happens to him through the neglect of that duty, for such subordinate is a representative of the company, and his negligence is that of the company: Northern Pac. R. R. Co. v. Poirier, 67 Fed. Rep. 881, 886; Ashman v. Flint etc. R. R. Co., 90 Mich. 567; Frost v. Oregon etc. Ry. Co., 69 Fed. Rep. 936, 940; New York etc. R. R.

Co. v. O'Leary, 93 Fed. Rep. 737; *Promer v. Milwaukee etc. Ry. Co.*, 90 Wis. 215, 48 Am. St. Rep. 905; *Bushby v. New York etc. R. R. Co.*, 107 N. Y. 374, 1 Am. St. Rep. 844; *Dobbin v. Richmond etc. R. R. Co.*, 81 N. O. 446, 31 Am. Rep. 512; *Balhoff v. Michigan Cent. R. R. Co.*, 106 Mich. 606, 612; *Welty v. Lake Superior etc. Ry. Co.*, 100 Wis. 128, 143. This rule applies to the duty of keeping the frogs in its yard filled or blocked: *Ashman v. Flint etc. R. R. Co.*, 90 Mich. 567; to the duty of establishing a timetable for the running of trains, their arrival at stations, and speed, and to the duty of bringing the timetable and any temporary changes in it to the notice of all persons who are charged with operating trains on its track: *Frost v. Oregon etc. Ry. Co.*, 69 Fed. Rep. 936; *Northern Pac. R. R. Co. v. Poirier*, 67 Fed. Rep. 881, 889; to the construction and erection of semaphores: *Welty v. Lake Superior etc. Ry. Co.*, 100 Wis. 128, 143; and to the duty of sending out a sufficient number of brakemen with a train: *Booth v. Boston etc. R. R. Co.*, 73 N. Y. 38, 29 Am. Rep. 97. If a railway car, while moving in the yard of the corporation, is cut loose from the engine and left in the charge of an employé, and he, while riding on it down the track, at night and in the dark, places himself on its rear instead of its front, with no signal or other means of warning upon or near its front, his negligence in this respect is a neglect of the duty which the corporation owed to its employés, and, therefore, any of them, if injured, may recover compensation therefor: *Promer v. Milwaukee etc. Ry. Co.*, 90 Wis. 215, 48 Am. St. Rep. 905. If a conductor and engineer disobey a train dispatcher's orders, and a brakeman receives injuries in a collision caused by such negligence, the company is answerable: *Northern Pac. R. R. Co. v. Cavanaugh*, 51 Fed. Rep. 517. A person intrusted with a railway company's power of control of the practical business done at its roundhouse at the time of an accident, and also intrusted with directing the movements of the engines and employés engaged there, is the representative of the company, and not a fellow-servant with such employés so as to relieve the company of liability to one of them injured through such representative's negligence while working under his orders in respect to an act performed in pursuance of his authority over that branch of the business: *Dayharsh v. Hannibal etc. R. R. Co.*, 106 Mo. 570, 23 Am. St. Rep. 900. A head "hostler" at a roundhouse, however, without authority to hire or discharge, is only a fellow-servant, though he directs what to do, but the foreman in charge of the roundhouse and of all that is done there, with power to hire or discharge servants, is a vice-principal: *Smith v. St. Louis etc. Ry. Co.*, 151 Mo. 391. But that a foreman at a roundhouse of a railroad is a fellow-servant of an employé working under him, see *Gonsior v. Minneapolis*, 36 Minn. 335; and that the foreman of a yard switching crew and the switchmen are fellow-servants, where all operation of the yard is under the direction and supervision of a yard-master, see *Harley v. Louisville etc. R. R. Co.*, 57 Fed. Rep. 144.

The general manager of a railroad, having charge of the road, rolling-stock, and employes, is the alter ego of the corporation: *Krogg v. Atlanta etc. R. R.*, 77 Ga. 202, 4 Am. St. Rep. 79. The board of directors of a railroad company are its immediate representatives, and occupy the relation of master to the various employes engaged in operating the road and superintending and performing the business of the company in its various departments: *Columbus etc. Ry. Co. v. Arnold*, 31 Ind. 174, 99 Am. Dec. 615. The higher officers, agents, or servants of a railroad company, who have the power from the company to employ, retain, or discharge other employes, or who have power from the company to furnish implements, machinery, or materials to the other employes, for them to operate with, cannot, with any degree of propriety be termed fellow-servants with the other employes who do not possess any such extensive powers and who have no choice but to obey such superior officers, agents, or servants, who must be deemed, in all cases within the scope of their authority, to have acted for their principal in the place of their principal, and, in fact, to have been the principal: *Kansas Pac. Ry. Co. v. Salmon*, 14 Kan. 512, 524. A person who is engineer, superintendent, conductor, and master of a gravel and material train of a railroad company who has power to employ and discharge men, and who has entire charge of this branch of business on his section of the railroad, known as that of digging gravel, putting the same upon the track, digging ditches and repairing the same, and also repairing culverts, etc., is a representative of the company: *Dobbin v. Richmond etc. R. R. Co.*, 81 N. C. 446, 31 Am. Rep. 512. But a station agent, in a matter where he owes to the company the duty of a servant only, is not a vice-principal: *Galveston etc. Ry. Co. v. Farmer*, 78 Tex. 85. As to what particular railroad employes are vice-principals, see the specific heads in other subdivisions of this note.

A *Roadmaster* of a railroad company, upon whom is devolved the duty of seeing that the road is kept in good condition and in good repair all the time, represents the company, in the line of his duty, as vice-principal or alter ego, and his negligence in a matter causing an injury is that of the company: *Atchison etc. R. R. Co. v. Moore*, 31 Kan. 197; *Hoke v. St. Louis etc. Ry. Co.*, 88 Mo. 360; *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409, 19 Am. St. Rep. 180; particularly where he has power to hire and discharge employes: *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409, 19 Am. St. Rep. 180. So with an assistant roadmaster: *Palmer v. Michigan Cent. R. R. Co.*, 93 Mich. 363, 32 Am. St. Rep. 507. But in Texas, a roadmaster, even with power to hire and discharge, is not a vice-principal. He and a section hand are there held to be fellow-servants: *Galveston etc. Ry. Co. v. Smith*, 76 Tex. 611, 18 Am. St. Rep. 78.

Scaffold Builders.—A master's duty to an employe to furnish, when necessary, a reasonably safe structure or scaffold on which to work is a personal, positive, absolute obligation, and he cannot, by dele-

gating it to another, absolve himself from liability for its nonperformance. The master is answerable for the negligent performance of such duty whether he undertakes it personally or through an agent, and this is true although the agent may, as to other matters, be merely a fellow-servant. Any person who performs this duty for the master is the latter's representative or vice-principal: Chicago etc. R. R. Co. v. Scanlan, 170 Ill. 106; Brown v. Gilchrist, 80 Mich. 56, 59, 20 Am. St. Rep. 496, 498; Sullivan v. Hannibal etc. R. R. Co., 107 Mo. 66, 28 Am. St. Rep. 388; Sims v. American Steel Barge Co., 56 Minn. 73, 45 Am. St. Rep. 451; Chicago etc. R. R. Co. v. Maroney, 170 Ill. 520, 62 Am. St. Rep. 396; Edward Hines Lumber Co. v. Ligas, 172 Ill. 315, 64 Am. St. Rep. 38; Cadden v. American Steel Barge Co., 88 Wis. 409, 418; Blackman v. Thomson-Houston etc. Co., 102 Ga. 64; F. C. Austin Mfg. Co. v. Johnson, 89 Fed. Rep. 677; Kerr-Murray Mfg. Co. v. Hess, 98 Fed. Rep. 56; Haworth v. Seever's Mfg. Co., 87 Iowa, 765; Blomquist v. Chicago etc. Ry. Co., 60 Minn. 426; McNamara v. Macdonough, 102 Cal. 575. Thus, a master is answerable for the negligent performance by his servant of a duty to place boards in a lumber yard in position for a scaffold on which other servants are to stand while handling lumber: Edward Hines Lumber Co. v. Ligas, 172 Ill. 315, 64 Am. St. Rep. 38. So men composing a crew, whose exclusive work and duty is to put up such staging and scaffolding as is needed from time to time, for the use of workmen engaged in a steel barge company's general work and business, are not fellow-servants with workmen, such as ship-platers, but are representatives of the company: Sims v. American Steel Barge Co., 56 Minn. 68, 45 Am. St. Rep. 451. The general rule, however, requiring the master to use reasonable care to provide a reasonably safe place for the servant to work in does not apply to those cases of frequent occurrence in which it is the duty of the servant, by force of the nature of his employment, to make the staging, scaffolding, or similar structure upon which he does his work reasonably safe for his own use: Channon v. Sanford Co., 70 Conn. 573, 66 Am. St. Rep. 133.

Section Bosses or Track Foremen.—A section master or section foreman is the representative or vice-principal of the railway company in the performance of any act, service, or duty in the line of his employment, where he is discharging a duty of the company, such as making the track safe, etc., and the latter is answerable for his negligence, whereby a section hand under him or trainman is injured: Sweeney v. Gulf etc. Ry. Co., 84 Tex. 433, 31 Am. St. Rep. 71; Bateman v. Peninsular Ry. Co., 20 Wash. 133; Colorado etc. Ry. Co. v. Naylon, 17 Colo. 501, 31 Am. St. Rep. 335; Drymala v. Thompson, 26 Minn. 40; Miller v. Missouri Pac. Ry. Co., 109 Mo. 350, 32 Am. St. Rep. 673; Gann v. Railroad, 101 Tenn. 380, 70 Am. St. Rep. 687; Stephens v. Hannibal etc. R. R. Co., 96 Mo. 207, 9 Am. St. Rep. 338; St. Louis etc. Ry. Co. v. Weaver, 85 Kan. 176, 57 Am. Rep. 176; Calvo v. Charlotte, 23 S. C. 526, 55 Am. Rep. 28; Moon v. Rich-

mond etc. R. R. Co., 78 Va. 745, 49 Am. Rep. 401; Lewis v. St. Louis etc. R. R. Co., 59 Mo. 495, 21 Am. Rep. 385; Atchison etc. R. R. Co. v. Moore, 29 Kan. 632, 644; Johnson v. Southern Ry. Co., 122 N. C. 955; Wellman v. Oregon etc. Ry. Co., 21 Or. 530, 541; Justice v. Pennsylvania Co., 130 Ind. 321; Fisher v. Oregon etc. Ry. Co., 22 Or. 533; Electric Ry. Co. v. Lawson, 101 Tenn. 406; Couch v. Charlotte etc. R. R. Co., 22 S. C. 557; Railroad v. Northington, 91 Tenn. 56; Louisville etc. R. R. Co. v. Bowler, 9 Helsk. 866; Northern Pac. R. R. Co. v. Peterson, 51 Fed. Rep. 182; McDermott v. Hannibal etc. R. R. Co., 87 Mo. 285; Patton v. Western etc. R. R. Co., 96 N. C. 455, 463; Russ v. Wabash etc. Ry. Co., 112 Mo. 45; Daves v. Southern Pac. Co., 98 Cal. 19, 35 Am. St. Rep. 133; as, where an employe on a wood train is injured through the negligence of a section foreman in taking up a rail for track repair without putting out proper signals to warn approaching trains: Drymala v. Thompson, 26 Minn. 40; or, where a section foreman, under whom the plaintiff was employed, directed a water keg to be placed on the front end of a hand-car for his seat, so that he could look ahead and observe the track, and, while the car was in motion, got up and allowed the keg to fall off, thus causing the car to leave the track and to injure the plaintiff: Russ v. Wabash etc. Ry. Co., 112 Mo. 45. It should be observed that, in some jurisdictions, power conferred upon a section foreman to superintend, direct, and control the workmen under his charge makes him a vice-principal: McDermott v. Hannibal etc. R. R. Co., 87 Mo. 285; Russ v. Wabash etc. Ry. Co., 112 Mo. 45; Stephens v. Hannibal etc. R. R. Co., 96 Mo. 207, 9 Am. St. Rep. 336; Miller v. Missouri Pac. Ry. Co., 109 Mo. 350, 32 Am. St. Rep. 678; Colorado etc. Ry. Co. v. Naylor, 17 Colo. 501, 31 Am. St. Rep. 835; Railroad v. Northington, 91 Tenn. 56; Northern Pac. R. R. Co. v. Peterson, 51 Fed. Rep. 182; while in others the power to hire and discharge, coupled with the authority of direction, control, and superintendence, constitutes him a vice-principal: Patton v. Western etc. R. R. Co., 96 N. C. 455; Johnson v. Southern Ry. Co., 122 N. C. 955. The fact of supervision, however, or of authority, does not alter the nature of the duty which he is employed to do. The question is as to the nature of the duty, and not the rank or grade of the person employed to perform it: Calvo v. Charlotte etc. R. R. Co., 28 S. C. 528, 55 Am. Rep. 28. In Indiana, it is held that a section foreman of a railroad, with power to employ and discharge section hands, is a vice-principal when employing and discharging servants, but that he is a fellow-servant of the men under his control after their employment: Justice v. Pennsylvania Co., 130 Ind. 321.

In the matter of providing safe appliances for the use of his subordinates, a section foreman bears to such subordinates the relation of a vice-principal, and for his negligence in this regard the company is liable: Gann v. Railroad, 101 Tenn. 380, 70 Am. St. Rep. 667. So, where he fails to give notice, after receiving information,

of obstructions upon the track, such as a slide of earth: *Wellman v. Oregon etc. Ry. Co.*, 21 Or. 530, 541. A street railway company is answerable for the negligence of a track foreman, acting as motor-man of an electric car, in ordering a track hand to board the car while in motion, but failing to stop the car in time to save him from the peril thus incurred: *Electric Ry. Co. v. Lawson*, 101 Tenn. 406. In Texas, no distinction is drawn between the performance of those higher duties specially intrusted to a section foreman, and those of an ordinary character, which both he and the subordinate servants under him are in the habit of indiscriminately performing: *Sweeney v. Gulf etc. Ry. Co.*, 84 Tex. 433, 31 Am. St. Rep. 71.

There are many cases, on the other hand, which hold that a gang boss, track foreman, or section master is not a vice-principal, but only a fellow-servant with those working under him. Among these cases are *Spancake v. Philadelphia etc. R. R. Co.*, 148 Pa. St. 184, 33 Am. St. Rep. 821; *Olson v. St. Paul etc. Ry. Co.*, 38 Minn. 117; *Keenan v. New York etc. R. R. Co.*, 145 N. Y. 190, 45 Am. St. Rep. 604; *Schroeder v. Flint etc. R. R. Co.*, 103 Mich. 218, 50 Am. St. Rep. 354; *Morch v. Toledo etc. Ry. Co.*, 113 Mich. 154; *Goodwell v. Montana Cent. Ry. Co.*, 18 Mont. 293; *Lagrone v. Mobile etc. R. R. Co.*, 67 Miss. 592; but it is apprehended that, in most of such cases, it will be found that the section master was engaged merely in the discharge of his ordinary duties in the course of his employment, such as track laying, track repairing, etc., and that he was not charged with any duty which the master was bound to perform. Cases holding him to be a fellow-servant when so employed do not conflict with those holding him to be a vice-principal when charged with some duty of the master.

Shippers.—A railroad company which delegates to shippers the duty of seeing that freight-cars are in good condition and safely loaded is answerable for their negligence to one of its employes injured thereby. The shippers, in such a case, represent the master: *Bushby v. New York etc. R. R. Co.*, 107 N. Y. 374, 1 Am. St. Rep. 844.

Superintendents.—In some states a superintendent, vested with the control and supervision of a particular work to be done, and with power to direct and control the men under him in their work, is held to be a vice-principal or representative of his employer, thus rendering the latter answerable for his negligence: *Cook v. Hannibal etc. R. R. Co.*, 63 Mo. 397.

And the same is true where the power to employ and discharge workmen is coupled with the superintendent's other authority: *Hussey v. Coger*, 112 N. Y. 614, 8 Am. St. Rep. 787; *Cheaney v. Ocean Steamship Co.*, 92 Ga. 726, 44 Am. St. Rep. 113; *Brothers v. Cartter*, 52 Mo. 373, 14 Am. Rep. 424; *Pantzar v. Tilly etc. Min. Co.*, 99 N. Y. 366; *Chicago etc. Brick Co. v. Sobkowiak*, 148 Ill. 573; *Gormley v. Vulcan Iron Works*, 61 Mo. 492. In another class of cases, it is held that where some special duty of a master is delegated to a

superintendent, he stands, so far as the performance of that duty is concerned, in the place of the master. In other words, he is a vice-principal, and the master is answerable for his negligence: *Galveston etc. Ry. Co. v. Smith*, 76 Tex. 611, 18 Am. St. Rep. 78; *Cheaney v. Ocean Steamship Co.*, 92 Ga. 726, 44 Am. St. Rep. 113; *Walker v. Bolling*, 22 Ala. 294, 315; *Woodson v. Johnston*, 109 Ga. 454; *Whalen v. Centenary Church*, 62 Mo. 326; *Anderson v. Bennett*, 16 Or. 515, 8 Am. St. Rep. 311; whether such negligence consists in a failure to give such information and orders to railway men on a train as will enable them to avoid collisions: *Galveston etc. Ry. Co. v. Smith*, 76 Tex. 611, 18 Am. St. Rep. 78; a failure to keep his promise to a workman, engaged in loading cotton in the hold of a ship, to station a hatchtender in the hatchway, to warn laborers as to when freight is going to be dropped into the hold: *Cheaney v. Ocean Steamship Co.*, 92 Ga. 726, 44 Am. St. Rep. 113; a failure to exercise care in employing competent servants, or in not dismissing those who are proved to be incompetent: *Walker v. Bolling*, 22 Ala. 294, 315; or a failure to build a secure scaffold: *Whalen v. Centenary Church*, 62 Mo. 326.

A vice-principal, for whose negligence an employer is liable to other employes, must be either one in whom the employer has placed the entire charge of the business or of a distinct branch of it, giving him not merely authority to superintend certain work, but control of the business, and exercising no discretion or oversight over him, or one to whom he has delegated a duty of his own, which is a direct, personal, and absolute obligation, from which nothing but performance can relieve him: *Prevost v. Citizens' Ice etc. Co.*, 185 Pa. St. 617, 64 Am. St. Rep. 659; *Lewis v. Selfert*, 116 Pa. St. 628, 2 Am. St. Rep. 631; *New York etc. R. R. Co. v. Bell*, 112 Pa. St. 400. Employers are, however, answerable to under-servants for the negligence of superintendents and representatives acting within the scope of their employment, and who are given the control of a distinct department in which their duty is entirely that of direction and superintendence: *Denver etc. R. R. Co. v. Driscoll*, 12 Colo. 520, 13 Am. St. Rep. 243. In accordance with these principles, the superintendent of an oilmill: *Galveston Oil Co. v. Thompson*, 76 Tex. 235, 237; or of a stone quarry: *Hoosier Stone Co. v. McCain*, 133 Ind. 231; *Belleville Stone Co. v. Mooney*, 60 N. J. L. 323, 332; or of a grain elevator: *McGovern v. Central Vt. R. R. Co.*, 123 N. Y. 280, 288; or of a planing-mill: *Shumway v. Walworth etc. Mfg. Co.*, 98 Mich. 411, 414; or of a breakwater or jetty work constructed under contract for the United States: *Callan v. Bull*, 113 Cal. 593, 603; or of contract work for a railroad company, where frozen ground is blasted with dynamite and other explosives: *Burke v. Anderson*, 69 Fed. Rep. 814; or of the business and affairs of a railroad company about a depot: *Lalor v. Chicago etc. R. R. Co.*, 52 Ill. 401, 4 Am. Rep. 616; is, in legal effect, so far as he is charged with the duty of the master as to the protection of his employes, a safe place

to work, suitable appliances, and the appointment of competent persons to perform their respective duties, a vice-principal or representative of the master, who is answerable for his negligence, where the injured employé was without fault. The same rule applies where an employé was injured in obeying orders from an assistant superintendent whose negligence produced the injury, for he represented the master: *Chicago etc. R. R. Co. v. McLallen*, 84 Ill. 109.

If a master's duty to provide safe and suitable machinery for the use of his servants and to keep it in safe condition is delegated to a superintendent, the latter is the master's alter ego, and the employer is answerable to a servant who suffers injury by reason of the unsafe condition of such machinery, or from the negligence of the superintendent to give proper warning to avoid danger: *Indiana Car Co. v. Parker*, 100 Ind. 181; *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 262, 44 Am. Rep. 573; *Atchison etc. R. R. Co. v. McKee*, 37 Kan. 592; *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *Mitchell v. Robinson*, 80 Ind. 281, 41 Am. Rep. 812; *Dowling v. Allen*, 74 Mo. 13, 41 Am. Rep. 298; *Shumway v. Walworth etc. Mfg. Co.*, 98 Mich. 411, 416; *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521; *Cumberland etc. R. R. Co. v. State*, 44 Md. 283, 292; *Railroad Co. v. Fort*, 17 Wall. 553; *Fort v. Union Pac. R. R. Co.*, 2 Dill. 259. Where one is superintending-work, has two foremen, and a number of men under him, whom he employs and discharges at pleasure, and has control of the cars, tools, and machinery, he is not a fellow-servant, but a vice-principal, and his employer is, therefore, answerable for his negligence in giving an order for the removal of a stick or brake, whereby a car on which men were riding became unmanageable and ran against another car and wounded the plaintiff: *Denver etc. R. R. Co. v. Driscoll*, 12 Colo. 520, 13 Am. St. Rep. 243. So one is a vice-principal, and not a fellow-servant, where he is selected to superintend work, such as the removal of a large gear-wheel, weighing upward of twelve tons, from the wheel-pit of a factory, which is dangerous without such supervision and without the selection of proper appliances, and the persons whom he is to superintend have not, without his supervision, the mechanical knowledge requisite for the selection of such materials and the safe performance of the work: *McElligott v. Randolph*, 61 Conn. 157, 29 Am. St. Rep. 181. And the selection by a master of a competent person to superintend the execution of work does not deprive a servant of the right to recover of the principal for injuries received in doing such work, and occasioned by such superintendent's absenting himself and leaving the selection of the means and manner of attempting to perform the work in the hands of inexperienced and incompetent men: *McElligott v. Randolph*, 61 Conn. 157, 29 Am. St. Rep. 181.

A corporation is liable for an injury to its employé through the negligence of its general superintendent: *Wilson v. Willimantic Linen Co.*, 50 Conn. 433, 47 Am. Rep. 653; *Woodson v. Johnston*, 109 Ga. 454; *Klochinski v. Shores Lumber Co.*, 93 Wis. 417. Compare

Railway Co. v. Henderson, 37 Ohio St. 549. As a corporation can act only through its officers and agents, the officer having charge of its business must, for practical purposes, be regarded as the corporation: Ardesco Oil Co. v. Gilson, 63 Pa. St. 146. A superintendent of a railroad company clothed with the power and authority of a board of directors, in regard to the management of trains and all arrangements connected therewith, is the immediate representative and corporate officer: Washburn v. Nashville etc. R. R. Co., 3 Head, 638, 75 Am. Dec. 734. So an officer of a railroad, having charge of a department of its business in which an injury occurs, is the person who is expected to use ordinary care in the employment of proper conductors and other servants. His carelessness in that respect is the carelessness of the company, and his knowledge is its knowledge: Frazier v. Pennsylvania R. R. Co., 38 Pa. St. 104, 80 Am. Dec. 467. A railroad division superintendent who has general charge and supervision of the entire business over the division is a vice-principal, and acts in the master's place: Louisville etc. Ry. Co. v. Heck, 151 Ind. 292; Town v. Michigan Cent. R. R. Co., 84 Mich. 214, 222. An assistant railway superintendent is also a representative of the company: Chicago etc. R. R. Co. v. McLallen, 84 Ill. 109.

A superintendent or vice-principal must, however, be regarded as a fellow-servant with other employes of his master, who are under his charge and control, when he is not discharging the duties of superintendent or vice-principal, but is engaged in the performance of duties which properly belong to an ordinary servant or employe: Hussey v. Cogger, 112 N. Y. 614, 8 Am. St. Rep. 787. Compare the subdivision, "Foremen," supra.

Switchmen have been held to be fellow-servants of all other employes engaged in the common object of securing the safe passage of railroad trains: St. Louis etc. Ry. Co. v. Needham, 63 Fed. Rep. 107; Northern Pac. R. R. Co. v. Mase, 63 Fed. Rep. 114; Miller v. Southern Pac. Co., 20 Or. 285; Harley v. Louisville etc. R. R. Co., 57 Fed. Rep. 144; Daves v. Southern Pac. Co., 98 Cal. 19, 35 Am. St. Rep. 133. Contra, that their negligence is not that of fellow-servants, but that of the railroad company, see Coleman v. Wilmington etc. R. R. Co., 25 S. C. 446, 60 Am. Rep. 516; Kastl v. Wabash R. R. Co., 114 Mich. 53; and compare the case of Mase v. Northern Pac. R. R., 57 Fed. Rep. 283, cited in the subdivision, "Conductors of Railway Trains," supra.

A *Telegraph Operator* whose duty is to control the running of a train over a railroad track, and, to that end, to know whether or not it is obstructed, is performing the duty of the master to his employes, the performance of which cannot be delegated to another, so as to relieve the master from liability. In other words, such operator is a vice-principal, and a brakeman injured through his negligence in giving a signal for a train to proceed, when the track is occupied by another train, may recover of the common employer: Flannegan v. Chesapeake etc. Ry. Co., 40 W. Va. 436, 52 Am. St.

Rep. 896. Such operator represents the railroad company in keeping employes informed of the movements of trains, and giving notice of the establishment of timetables, and of changes therein, or of the making of new ones: *Northern Pac. R. R. Co. v. Charles*, 51 Fed. Rep. 562, 569; *Frost v. Oregon etc. Ry. Co.*, 69 Fed. Rep. 936, 939, 942; *East Tennessee etc. R. R. Co. v. De Armond*, 86 Tenn. 73, 6 Am. St. Rep. 816; *Dana v. New York etc. R. R. Co.*, 92 N. Y. 639, 642; and also as to reporting defects in roads and bridges, or obstructions of any kind, wherever met, when they come to the operator's knowledge, and he is required by the company's rules to so report: *Hall v. Galveston etc. Ry. Co.*, 39 Fed. Rep. 18. But it has been held that a telegraph operator whose duty is to display signals to prevent one train from following another too closely on the same track: *Cincinnati etc. R. R. Co. v. Clark*, 57 Fed. Rep. 125; or whose duty is to receive and deliver the orders of the train dispatcher as to the movement of trains, is the fellow-servant of railroad employes in charge of the train on which an injury occurs: *Oregon etc. Ry. Co. v. Frost*, 74 Fed. Rep. 965; *McKaig v. Northern Pac. R. R. Co.*, 42 Fed. Rep. 288.

Timber-yard Man.—A person having full control of a timber yard of a railroad company, and who employs and discharges men, is to be regarded as a vice-principal; and one who takes his place in his absence is a temporary vice-principal; and the negligence of either resulting in personal injury to a subordinate employe is not the negligence of a fellow-servant, and the company is liable. And notice to a temporary vice-principal is notice to the company: *Baldwin v. St. Louis etc. R. R. Co.*, 75 Iowa, 297, 9 Am. St. Rep. 479.

A Train Dispatcher who controls and directs the movements of trains on a division of a railroad is not a fellow-servant with trainmen in the employ of the railroad company, but is a vice-principal, for whose negligence the company is answerable: *Louisville etc. Ry. Co. v. Heck*, 151 Ind. 292, 313; *Hankins v. New York etc. R. R. Co.*, 142 N. Y. 416, 40 Am. St. Rep. 616; *Galveston etc. Ry. Co. v. Smith*, 76 Tex. 611, 18 Am. St. Rep. 78; *Lewis v. Seifert*, 116 Pa. St. 628, 2 Am. St. Rep. 631; *Smith v. Wabash etc. Ry. Co.*, 92 Mo. 359, 1 Am. St. Rep. 729; *Darrigan v. New York etc. R. R. Co.*, 52 Conn. 285, 52 Am. Rep. 590; *Booth v. Boston etc. R. R. Co.*, 73 N. Y. 38, 29 Am. Rep. 97; *Flike v. Boston etc. R. R. Co.*, 53 N. Y. 549, 13 Am. Rep. 545; *Sheehan v. New York etc. R. R. Co.*, 91 N. Y. 832; *Railroad Co. v. Barry*, 58 Ark. 198; *Phillips v. Chicago etc. Ry. Co.*, 64 Wis. 475; *Chicago etc. R. R. Co. v. McLallen*, 84 Ill. 109; *Hunn v. Michigan Cent. R. R. Co.*, 78 Mich. 513, 523; *Lasky v. Canadian Pac. Ry. Co.*, 83 Me. 461; *McKune v. California etc. R. R. Co.*, 66 Cal. 302; *Baltimore etc. R. R. Co. v. Camp*, 65 Fed. Rep. 952; *Northern Pac. R. R. Co. v. Poirier*, 67 Fed. Rep. 881, 884; whether the person injured is a locomotive engineer: *Darrigan v. New York etc. R. R. Co.*, 52 Conn. 285, 52 Am. Rep. 590; a fireman: *Hankins v. New York etc. R. R. Co.*, 142 N. Y. 416, 418, 40 Am. St. Rep. 616, 617; Railroad

Co. v. Barry, 58 Ark. 198; a brakeman: **Phillips v. Chicago etc. Ry. Co.**, 64 Wis. 475; or some other servant of the company: **Hunn v. Michigan Cent. R. R. Co.**, 78 Mich. 513, 523; and it makes no difference whether the train dispatcher is a master mechanic, division superintendent, or other agent of the company: **Northern Pac. R. R. Co. v. Poirier**, 67 Fed. Rep. 881, 884. The company is liable where a train is dispatched without enough brakemen: **Flike v. Boston etc. R. R. Co.**, 53 N. Y. 549, 13 Am. Rep. 545; **Booth v. Boston etc. R. R. Co.**, 73 N. Y. 38, 29 Am. Rep. 97. And it is immaterial whether the train dispatcher's orders are verbal or written: **Smith v. Wabash etc. Ry. Co.**, 92 Mo. 359, 1 Am. St. Rep. 729. If he originates and promulgates orders for the running of trains without regard to their ordinary timetables, and when each is approaching the other in entire ignorance of the other's whereabouts, he is acting as a master, who is liable for his negligence: **Hankins v. New York etc. R. R. Co.**, 142 N. Y. 416, 40 Am. St. Rep. 616. If he, as representative of the company, determines that he cannot give written orders, as required by the rules, but gives verbal orders to meet an emergency, such orders are the act of the company; and if its employé, acting under such orders, is injured through the negligence of the train dispatcher, the company is answerable: **Smith v. Wabash etc. Ry. Co.**, 92 Mo. 359, 1 Am. St. Rep. 729.

But a railroad train dispatcher who has no power to employ or discharge the telegraph operators in the employ of the railroad company is not a vice-principal as to them: **Reiser v. Pennsylvania Co.**, 152 Pa. St. 38, 34 Am. St. Rep. 620. That a train dispatcher and brakeman are fellow-servants, see **Robertson v. Terre Haute etc. R. R. Co.**, 78 Ind. 77, 41 Am. Rep. 552; and that he and a fireman were held, under exceptional circumstances, to be fellow-servants, see **Slater v. Jewett**, 85 N. Y. 61, 39 Am. Rep. 627. Compare **Blessing v. St. Louis etc. Ry. Co.**, 77 Mo. 410; **Railway Co. v. Henderson**, 37 Ohio St. 549. Compare the next subdivision, and see "Telegraph Operators," *supra*.

A *Trainmaster* who has control of all trains, employés, and everything which goes upon the track on his division has such relation to the railway company that he is deemed its representative. Hence, the company is answerable for his negligence: **International etc. Ry. Co. v. Prince**, 77 Tex. 560, 19 Am. St. Rep. 785. Compare **Goodman v. Delaware etc. Canal Co.**, 167 Pa. St. 332; and see the next preceding subdivision.

Trestle Builders.—As a master must furnish a safe place to work, he is answerable for injuries caused to employés by insecure trestles where he has intrusted the performance of work in which they are built to an agent. Such agent, as to the safety and protection of the employés, represents the master: **Fink v. Des Moines Ice Co.**, 84 Iowa, 821. A master is also liable for injury to an employé caused by the act of his vice-principal in causing a trestle to be weakened, though the concurrent negligence of a fellow-servant

contributed to the result: *Northwestern Fuel Co. v. Danielson*, 37 Fed. Rep. 915. A foreman of a gang of railway workmen engaged in repairing trestles and bridges, and having power to employ and discharge such men and to oversee and direct their work, is a vice-principal of the railway company, and it is liable for his negligence, whereby one of the workmen receives an injury: *Bloyd v. St. Louis etc. Ry. Co.*, 58 Ark. 66, 41 Am. St. Rep. 85. A foreman in helping to build a trestle is, however, merely a fellow-servant with the other workmen: *Lindvall v. Woods*, 41 Minn. 212.

A *Yardmaster* of a railway company who has full charge of the yards of the corporation, hires and discharges men therein, and assigns them to their labor is the agent or vice-principal of the company in this respect, as well as in furnishing safe appliances and places for their labor, and the company is answerable for his negligence: *Lyttle v. Chicago etc. Ry. Co.*, 84 Mich. 289; as where he is charged with the duty of protecting a car repairer, but fails to do so: *Railway Co. v. Triplett*, 54 Ark. 289. Contra, that a railway yardmaster is only a fellow-servant with switchmen or their foremen, see *Harley v. Louisville etc. R. R. Co.*, 57 Fed. Rep. 144; *Thomas v. Cincinnati etc. Ry. Co.*, 97 Fed. Rep. 245. The company is also liable for the negligence of an assistant yardmaster who fails to properly place a warning signal so as to avoid a collision with an approaching train: *Daniel v. Chesapeake etc. Ry. Co.*, 36 W. Va. 397, 32 Am. St. Rep. 870; or who, being charged with the control of cars, and their movements, fails to put a brakeman on a car being moved, or puts an incompetent brakeman upon it: *Louisville etc. R. R. Co. v. Davis*, 91 Ala. 487. So the yard boss of a lumber yard, whose duty therein is to superintend the piling of lumber and to direct and control the workmen, is a vice-principal, and not a fellow-servant of the men under him: *Zintek v. Stimson Mill Co.*, 6 Wash. 178; although he may occasionally act as tallyman, and although his authority to hire and discharge men is subject to the approval of the general superintendent: *Zintek v. Stimson Mill Co.*, 9 Wash. 395.

SETON v. HOYT.

[84 OREGON, 266.]

COUNTIES—LIABILITY OF, FOR INTEREST.—A sovereign state is not required to pay interest, except when self-imposed. Hence, a county, which is but an arm or agent of the state, is not liable for interest, under a general law regulating the subject of interest, where it is not expressly named therein as being so liable.

INTEREST—CHANGE IN LAW.—CONTRACTS which stipulate for interest will draw interest until payment at the rate agreed therein, or, in the absence of an agreed rate, at the rate prescribed by law when the contract was executed, and a change of the legal rate would not affect the rate recoverable.

COUNTIES—INTEREST ON WARRANTS—INDORSEMENT, "NOT PAID FOR WANT OF FUNDS"—EFFECT OF.—If county warrants are presented for payment when there is no money available for that purpose, and the law provides that the treasurer, in such event, shall indorse thereon, "Not paid for want of funds," after which the warrants are to draw legal interest, such nonpayment and indorsement amount to a contract, on the part of the county, to pay the legal rate of interest.

COUNTIES—INTEREST ON WARRANTS—CHANGE IN RATE.—County warrants indorsed, "Not paid for want of funds," bear interest at the legal rate which existed at the date of the indorsement, and this rate cannot afterward be reduced by the legislature.

STATUTES—IMPAIRING OBLIGATION OF CONTRACTS—INTEREST ON COUNTY WARRANTS.—The obligation of a county to pay interest on its warrants, which arises from nonpayment when they are presented, and an indorsement thereon, "Not paid for want of funds," is, as an implied contract, under the protection of that provision of the constitution which prohibits the passage of any law impairing the obligation of contracts.

STATUTES—CONSTRUCTION—PROSPECTIVE AND RETROSPECTIVE LAWS.—A statute should be given a prospective operation only, unless it plainly appears that it was intended to have a retrospective force.

Mandamus by Seton against Hoyt, county treasurer, to compel the payment of interest on a county warrant at the rate fixed by statute when the claim accrued. The writ was made peremptory and the defendant appealed.

Roscoe R. Giltner and Russell E. Sewell, district attorney, for the appellant.

William A. Cleland, for the respondent.

370 WOLVERTON, C. J. This is a proceeding by mandamus, the purpose of which is to determine whether the act of October 14, 1898, reducing the legal rate of interest, is operative upon interest bearing county warrants issued prior to its

passage, so as to limit the interest thereon to the present rate from and after said date. The act alluded to changes the prescribed rate of interest from eight to six per centum on all moneys after the same become due; on judgments and decrees for the payment of money; on money received to the use of another, and retained beyond a reasonable time without the owner's consent, express or implied, or on money due upon the settlement of matured accounts from the day the balance is ascertained; on money due or to become due, where there is a contract to pay interest, and no rate specified. It contains an emergency clause reciting "that inasmuch as the counties of the state are paying interest on their county warrants at ²⁷¹ the rate of eight per cent per annum, thereby imposing a useless burden upon the taxpayers, this act shall become a law upon receiving the signature of the governor." Section 3587 of Hill's Annotated Laws, of which this act is amendatory, is an amendment of section 1 of "An act to regulate the rate of interest on money and to prevent and punish usury," approved October 16, 1862: Laws 1862, p. 115. The original act contained a provision (section 6) which has been continued in force until the present day (Hill's Annotated Laws, sec. 3592) to the effect that it shall not be construed so as to affect or change the rate of interest to be received by virtue of any contract entered into prior to its becoming a law. Section 2465 of Hill's Annotated Laws as amended (Laws 1893, p. 59), relating to the duties of the county treasurer, provides, among other things, that: "He shall pay all orders of the county clerk when presented, if there be money in the treasury for that purpose, and write on the face of such order the date of redemption and his signature. If there be no funds to pay such order when presented, he shall indorse thereon 'Not paid for want of funds,' and the date of such presentment, over his signature, which shall entitle such order thenceforth to draw legal interest; provided, that such interest shall cease from the date of notice by publication," etc. By section 2467 county orders are redeemable by the county treasurer according to the time of presentment, but it is further provided that such orders as are payable out of the county revenue shall be received in payment of county taxes without regard to priority of presentment, but that the treasurer shall not pay any balance thereon over and above such tax, when there are outstanding orders unpaid for want of funds. These are the only provisions of the statute which have any bearing upon the case in hand.

²⁷³ 1. Defendant's theory touching the controversy embodies three principal contentions: 1. That the county is but an arm or agent of the state, and that the sovereign is not required to pay interest, except when self-imposed; 2. That a county order is not a contract between the county and the holder; and 3. That interest, when demandable under the statute, except when due upon an express contract for its payment, is in the nature of a penalty or damages for the detention of money due and unpaid, and, therefore, that it constitutes a part of the remedy in the enforcement of the demand, which may be modified, or even repealed altogether, by subsequent legislation, without impairment of any contractual relations. In our view of the case, we do not conceive the second proposition to be important or essential to the determination of the cause. As to the first, we are in accord with the contention of counsel, but as to the last we cannot give it our approval. There is some conflict in the authorities upon the question whether a sovereign state is required to pay interest unless self-imposed, but the weight thereof seems to support the contention that it is not. The supreme court of the United States has adopted the rule that interest is not allowable on claims against the government, whether they originate in contract or tort, or arise in the ordinary business of administration, or under private acts for relief, passed by Congress on special application. But it recognizes the existence of two well-established exceptions—one wherein the government has stipulated to pay interest, and the other where interest is given by act of Congress either expressly as such, or under the name of damages: *United States v. Bayard*, 127 U. S. 251. In a subsequent case of *United States v. North Carolina*, 136 U. S. 211, Mr. Justice Gray says: "Interest, when not stipulated for by contract ²⁷³ or authorized by statute, is allowed by the courts as damages for the detention of money, or of property, or of compensation, to which the plaintiff is entitled; and, as has been settled upon grounds of public convenience, is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of the legislature, or by a lawful contract of the executive officers." The rule applies as well to a sovereign state as to the national government. Nor is the state within the purview of a general law regulating the rate of interest upon money due or to become due, and this goes upon the ground that a sovereign is not bound by the words of a statute unless it is expressly named:

State v. Board of Public Works, 36 Ohio St. 409; *Carr v. State*, 127 Ind. 204, 22 Am. St. Rep. 624; *Attorney General v. Cape Fear Nav. Co.*, 37 N. C. 444; *Bledsoe v. State*, 64 N. C. 392; *Mt. Morris v. Williams*, 38 Ill. App. 401; *Madison County v. Bartlett*, 1 Scam. 67. That the county is but the agent or instrumentality of the state, constituted and employed essentially for the promotion of its general government, and therefore subject to like rules and restrictions governing its liabilities as the state, there can be no controversy: 1 Dillon on Municipal Corporations, sec. 23. We take it, therefore, that a county is not liable for the payment of interest under the general provisions of the statute regulating the rate upon the demands enumerated in said section 3587 as an individual would be where there is no contract to pay interest.

As a general rule, it may be conceded that where the demand falls within the purview of the statute, and by reason thereof is subject to an interest charge at the legal rate, the rate upon the demand will vary as the law fixing it may be changed or varied by the legislature ³⁷⁴ during the life of the demand. The reason of the rule is, that the person from whom the money is retained or withheld is entitled to an indemnity for the loss which he sustains on account of being deprived of its use, and it is assumed that the legal rate of interest for the time of the withholding is a fair measure of damages by which to determine such loss, in the absence of any other method of arriving at the exact or precise loss actually incurred: *State v. Guenther*, 87 Wis. 673; *Wilson v. Cobb*, 31 N. J. Eq. 91; *White v. Lyons*, 42 Cal. 279; *Mayor etc. v. O'Callaghan*, 41 N. J. L. 349.

Where there is an agreement to pay interest upon an obligation at a stipulated rate to a day certain—as, for instance, at maturity—and there is no engagement touching the rate the obligation shall subsequently bear, the authorities are in hopeless conflict as regards the rate of interest recoverable upon the deferred payment. They divide accordingly as it has become the settled policy of the courts touching the nature of the indemnity recoverable for the detention of the money beyond the day upon which it has fallen due and payable. Upon the one hand, it is held that such indemnity is purely a matter of damages, not in the least referable to the contract, although for breach thereof; and that the proper and appropriate measure of such damages is the rate of interest which the law has prescribed. Upon the other, it is considered that, while

the indemnity is recoverable as damages, yet the rate of interest which should be allowed is rather to be implied from the terms of the contract touching it prior to the maturity of the obligation. The idea is clearly expressed by Lord Selborne in *Cook v. Fowler*, L. R. 7 H. L. 27. He says: "Although, in cases of this class, interest for the delay of payment post diem ought to be given, it is on the principle, not of implied contract, but of damages ²⁷⁵ for breach of contract. The rate of interest to which the parties have agreed during the term of their contract may well be adopted, in an ordinary case of this kind, by a court or jury as a proper measure of damages for the subsequent delay; but that is because, ordinarily, a reasonable and usual rate of interest, which it may be presumed would have been the same whatever might be the duration of the loan, has been agreed to." *Price v. Railway Co.*, 16 Mees. & W. 244, *Morgan v. Jones*, 8 Welsb., H. & G. 620, and *Keene v. Keene*, 8 Com. B., N. S., 144, support this principle. Mr. Justice Gray, while chief justice of the supreme court of Massachusetts, by a most exhaustive and learned opinion, in which he has collated and reviewed all the authorities pro and con, came to the conclusion expressed by the following language: "When a written engagement is made, as authorized by the statute, to pay a greater rate of interest yearly than six per cent, the intention of the contract and the effect of the statute appear to us to be that the creditor shall receive the stipulated rate of interest so long as the debtor has the use of the principal; and that, in an action upon the contract, the creditor shall recover interest at that rate, not merely until the time when the principal is agreed to be paid to him, but until it is actually paid, or his claim for principal and interest judicially established." Later he denotes the principle upon which it rests. He says: "The interest after the breach of the contract, though not strictly recoverable as part of the debt, but rather as damages, is ordinarily to be measured, according to the intention manifested by the contract, by the standard thereby established": *Union Inst. for Savings v. Boston*, 129 Mass. 82, 37 Am. Rep. 305. See, also, *Brannon v. Hursell*, 112 Mass. 63.

2. Although the supreme court of the United States is ²⁷⁶ committed to the other view, yet it is there held that the question is one of local law. Mr. Justice Field, in *Cromwell v. Sac County*, 96 U. S. 51, after holding, in accord with the Iowa

courts, that contracts drawing a specified rate of interest before maturity draw the same rate afterward, and, citing other authorities in support of the rule, says: "There are, however, conflicting decisions; but the preponderance of opinion is in favor of the doctrine that the stipulated rate of interest attends the contract until it is merged in the judgment." Without further citation of authorities, we may say that the later tendency of the courts is in favor of the rule as announced in *Union Inst. for Savings v. Boston*, 129 Mass. 82, 37 Am. Rep. 305, and *Shaw v. Rigby*, 84 Ind. 375, 43 Am. Rep. 96, and it is the one which appeals most strongly to our judgment. In consonance with this view it is said in *State v. Guenther*, 87 Wis. 673, that "on a contract which stipulates for interest, interest at the agreed rate, or, in the absence of an agreed rate, at the rate prescribed by the law at the date of the contract, will be the rate recoverable until the repayment of the principal sum. A change of the legal rate would not affect the rate of interest recoverable upon such a contract": Citing *Spencer v. Maxfield*, 16 Wis. 178. So it was held in *Pruyn v. Milwaukee*, 18 Wis. (*367) 386, that city bonds conditioned for the payment of the principal at a specified day, with interest above the legal rate, continued to draw the stipulated rate after maturity. And *Earl, J.*, in *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64, states the rule to be that "where one contracts to pay money on demand 'with interest,' or to pay money generally 'with interest,' without specifying time of payment, the statutory rate then existing becomes the contract, and must govern until payment, or at least until demand and actual default, as the parties ²⁷⁷ must have so intended." In support of this proposition, see, also, *Paine v. Caswell*, 68 Me. 80, 28 Am. Rep. 21.

3. With this discussion of the rules of law that obtain relating to the recovery of interest upon agreements for its payment, we are now prepared to consider the effect of the county treasurer's indorsement, "Not paid for want of funds," upon a county order or warrant under the law which requires payment of interest thereon after such indorsement at the legal rate. It is contended by counsel for the plaintiff, contrary to defendant's position, that the order or warrant is itself a contract; but with this we have little concern. It is sufficient if the obligation which the law imposes upon the county, where the parties have dealt with it upon the faith of such obligation, constitutes a contract for the payment of the legal rate of in-

terest obtaining at the time of the indorsement. The order or warrant itself has at least the force of an audited demand against the county, and *prima facie* will support an action which may be instituted upon it to establish the same by judgment: *Goldsmith v. Baker City*, 31 Or. 249. People deal with the county upon the understanding that under the law their audited demands, evidenced by orders received from the clerk, will be paid on presentation to the treasurer, or, in case of lack of funds, indorsed so as to entitle them thenceforth to draw interest at the legal rate. They must also understand that the indorsed orders can only be redeemed by the county treasurer according to the priority of their presentment and indorsement. And thus it is that the time for payment is, from the nature of things, indefinite, depending entirely upon the state of the county treasury. This understanding the supreme court of Nebraska has characterized as an implied agreement on the part of the person dealing with the county that he shall wait until money is made ²⁷⁸ available by the ordinary mode of collecting revenues, and in the usual course of the county's business: *Brewer v. Otoe County*, 1 Neb. 373. This case is cited as authoritative in *Chapman v. Douglas County*, 107 U. S. 348. Now, if there is an implied agreement on the part of the holder of the warrant to abide the accumulation of funds in the ordinary course with which to meet the demand, the converse ought to be, and undoubtedly is, true, that there is an implied, if not an express, agreement, engendered by operation of law and the transaction of public business, which must be in conformity with its requirements, that the county will pay the legal rate of interest upon the indorsed county order. So that here is, in effect, an agreement or contract upon the part of the county to pay the legal rate of interest.

4. But it is argued, admitting a contract to exist to this extent, that the agreement is to pay only the legal rate as it may be established from time to time by the legislature, and that the contract was made with reference to the variable rate, and not solely with reference to that which prevailed at the date of the indorsement. In this we cannot concur, for, if we apply the general rule of law that where a person contracts for the payment of a definite rate of interest to a day certain, or contracts for the payment of interest without naming the rate, interest is recoverable in the one instance at the agreed rate after the day named, and in the other at the legal rate until judgment, we have a clear case of the right of the holder of

the indorsed order or warrant to recover from the county interest at the rate prevailing at the date of the indorsement to the time of its payment by the treasurer; and such we believe to be the law governing the transaction. It is well understood that the county cannot be coerced into making payment, and the warrant-holder, although he may ²⁷⁹ sue upon his warrant, and obtain judgment against the county, which would entitle him to another order or warrant in lieu of the judgment, yet he must abide his time, and await the accumulation of funds whereby to discharge the obligation in accordance with his implied agreement. And it would be unjust and inequitable if the other party to the contract, being an agency of the state, could, through the legislature, abolish or reduce interest to a nominal rate, and thus leave the party remediless for the recovery of any compensation for loss sustained by reason of delayed payment of his demand.

5. The constitutional provision against the impairment of contracts is not limited in its scope and purpose to express contracts and specific agreements, but extends as well to "that much larger class," says Mr. Justice Miller in *Fisk v. Jefferson Police Jury*, 116 U. S. 131, "in which one party having delivered property, paid money, rendered service, or suffered loss, at the request or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation. This obligation can no more be impaired by a law of the state than that arising on a promissory note": See, also, 2 Story on the Constitution, sec. 1377.

6. Even in the absence of a constitutional inhibition to a retrospective operation of legislative enactments, it is a general rule that a statute was intended to operate prospectively only, unless a purpose to give it a retrospective force is declared by clear and positive command, or is to be inferred by necessary and unavoidable implication from the language of the act, taken in its appropriate signification, and construed in connection with the subject matter and the occasion of the enactment, admitting of no reasonable doubt, but precluding all question as to such intention: *Endlich on Interpretation of Statutes*, ²⁸⁰ sec. 271; *Lesseps v. Wicks*, 12 La. Ann. 739; *People v. Board of Supervisors*, 70 N. Y. 228; *Chew Heong v. United States*, 112 U. S. 536; *Bay v. Gage*, 36 Barb. 447; *Bauer Grocer Co. v. Zelle*, 172 Ill. 407.

7. Nor does the emergency clause inserted in the amendatory act indicate an intention upon the part of the legislature

to extend its regulations to outstanding county orders or warrants, but, when considered in a prospective sense, under the rule which governs unless the intention otherwise clearly appears, the construction of the act in question is obvious, and its application clear. In *Koshkonong v. Burton*, 104 U. S. 668, the question was involved whether the holders of certain municipal bonds were entitled to interest upon coupons thereto attached, after their maturity, they not having been paid at the date stipulated therefor. It appears that the state courts of Wisconsin had construed the statute in force at the time of the issuance of such bonds as in harmony with the allowance of such interest. Thereafter the legislature, by direct enactment, attempted to place the opposite construction upon such statute, but it was held that the later enactment impaired the implied obligation of the municipality to pay interest upon interest as the law stood under the construction of the state courts, and that such interest was recoverable, notwithstanding the later act. *Union Sav. Bank v. Gelbach*, 8 Wash. 497, is parallel with the case at bar, and it was there held, but upon reasoning different from that which seems to us to be more in harmony with the legal conditions which prevail and surround the transaction, that a change in the legal rate of interest by legislative enactment did not affect the rate theretofore payable upon warrants issued prior to the date when the new enactment became operative. This case was followed in ²⁰¹ *Williams v. Shoudy*, 12 Wash. 362, wherein it is said: "The right of a holder of a warrant legally issued to interest (after proper presentment and indorsement made) is as fixed and certain in law as the right to demand payment of the principal": See, also, *State v. Bowen*, 11 Wash. 432; *Scranton v. Hyde Park Gas Co.*, 102 Pa. St. 382; *Missouri Pac. Ry. Co. v. Patton* (Tex. Civ. App., May 6, 1896), 35 S. W. Rep. 477; *First Nat. Bank v. Arthur*, 10 Colo. App. 283; *Butler v. Rockwell*, 17 Colo. 290; *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407; *Marks v. Trustees*, 37 Ind. 155.

Upon these principles and authorities we are constrained to affirm the judgment of the court below. We have reached the conclusion after much deliberation, and believe it to be in harmony with justice and fair dealing. The other view would lead, under the system adopted for the transaction of county business and the manner of payment of the orders or warrants of the county, to a practical repudiation of a material portion of the county's obligations. In the present case the county has

become obligated by positive enactment to pay the legal rate. Parties have dealt with it upon that understanding, and when claims duly audited, which have accrued in course of business transactions with the county, are presented and indorsed, "Not paid for want of funds," the law reads into the transaction a contract to pay interest thenceforth upon the warrant, and the measure of recovery for delay in payment is the then existing rate of interest until paid, and subsequent legislation cannot affect or impair the obligation.

Affirmed.

INTEREST.—A SOVEREIGN STATE is not liable for interest except in cases where it has promised to pay interest: *Note to Molineux v. State*, 50 Am. St. Rep. 51. Interest is a creature of the statute, and cannot be recovered unless authorized by it. The indebtedness of a municipal corporation does not bear interest in the absence of an express agreement to that effect, and of legislation giving power to contract for the payment of interest: *Pekin v. Reynolds*, 31 Ill. 529, 83 Am. Dec. 244.

INTEREST—EFFECT OF STATUTE CHANGING LEGAL RATE OF.—Interest follows a contract according to the law in existence at the time and place of the contract, or the performance of it, and a subsequent change in the legal rate does not affect the contract: *Note to Richardson v. Campbell*, 83 Am. St. Rep. 634. An act changing the rate of interest operates only on contracts made and debts incurred after the law went into operation: *North River Meadow Co. v. Shrewsbury Church*, 22 N. J. L. 424, 53 Am. Dec. 258.

INTEREST—LIABILITY OF STATE—RETROSPECTIVE STATUTE—RATE AFTER MATURITY.—If a claim against the state does not bear interest when it accrues, a statute subsequently passed cannot impose a liability upon the state for interest thereon: *Molineux v. State*, 109 Cal. 378, 50 Am. St. Rep. 49. The rate of interest on contracts of the state after their maturity is the rate mentioned in the statute authorizing such contracts, and not the rate specified in the general statutes of the state giving interest on contracts: *Carr v. State*, 127 Ind. 204, 22 Am. St. Rep. 624, and note, at page 648, showing that the king or sovereign is not bound by a statute unless expressly named therein.

STATUTES—IMPAIRING OBLIGATION OF CONTRACTS.—The constitutional provision on this subject extends to all rights arising under all contracts, whether express or implied: *Lewis v. Brackenridge*, 1 Blackf. 220, 12 Am. Dec. 228.

STATUTES—CONSTRUCTION—RETROACTIVE EFFECT.—A statute must not be given a retroactive effect unless its language expressly requires it: *People v. O'Brien*, 111 N. Y. 1, 7 Am. St. Rep. 684.

ESBERG CIGAR COMPANY v. PORTLAND.

[34 OREGON, 282.]

MUNICIPAL CORPORATIONS—NEGLIGENCE AS TO WATERWORKS—LIABILITY.—When a city voluntarily undertakes to construct and maintain waterworks, in pursuance of statutory authority, for its own private emolument and advantage, the works belong to it in its private, rather than in its public or governmental, capacity, though the public may derive a common benefit therefrom, and the city is, therefore, answerable to persons injured by negligence in the construction or maintenance of such works.

MUNICIPAL CORPORATIONS—EXEMPTION FROM LIABILITY FOR NEGLIGENCE AS TO WATERWORKS.—A city owning waterworks in its private capacity, though constructed and maintained under statutory authority, is not exempt from liability for negligence in the construction and maintenance of such works on the ground that the legislature has appointed a water committee to control the works, and that the committee is an independent body, over which the city has no control.

MUNICIPAL CORPORATIONS—LIABILITY OF, FOR NEGLIGENCE OF LEGISLATIVE AGENTS.—If a city, having statutory authority to construct, maintain, and operate waterworks, adopts a charter which vests the exercise of this power in a water committee, for the benefit of the city, it thereby makes the committee its agents to carry out the work, though the members thereof were appointed by the legislature, and the municipality is answerable, under the doctrine of respondeat superior, for their negligence in maintaining such works.

MUNICIPAL CORPORATIONS.—THE RESPONSIBILITY OF A CITY FOR THE ACTS OF ITS OFFICERS OR AGENTS does not depend upon the manner of their appointment, but upon the duty imposed upon them. If such duty appertains to mere political or governmental affairs, the municipality is not answerable; but if it pertains to the private affairs of the corporation, it is liable for their negligence, the same as a private individual.

NEGLIGENCE IN CONSTRUCTION OF WATER MAIN—EVIDENCE OF—SUBMISSION TO JURY.—The question as to whether a certain water main in a city was negligently constructed should be submitted to the jury, where there is evidence that it had burst twice before under an ordinary pressure; that a pipe of that size and thickness, if properly constructed and laid, would not ordinarily burst under such a pressure; and that there was no extraordinary or unusual pressure upon the pipe when it burst the third time.

NEGLIGENCE—PRESUMPTION OF, FROM ACCIDENT.—Whenever a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from a want of care.

Action against the defendant city to recover damages for an injury to the plaintiff's goods, caused by the bursting of a water main belonging to the city, and the consequent flooding of the

cellar in which such goods were stored. The plaintiff's claim had been rejected by the city, and this action was brought, which resulted in a nonsuit. The plaintiff appealed.

Cox, Cotton, Teal & Minor and Wirt Minor, for the appellant.

William M. Cake, Fred L. Keenan, Joel M. Long, city attorney, and Ralph R. Duniway, for the respondent.

²⁸⁷ BEAN, J. In support of the judgment it is contended:

1. That the waterworks belong to the city in its public or governmental capacity, and it is therefore not liable to a common-law action for negligence in constructing or maintaining the same; 2. That the water committee, under whose direction and control they were constructed and were being maintained at the time of the accident, is an independent body, appointed by the state for public governmental purposes, over which the city has no control, and for whose negligence it is not liable under the common-law doctrine of *respondeat superior*; and 3. That there was not sufficient evidence of negligence given on the trial to carry the case to the jury as a question of fact.

1. There is a well-established distinction made by the authorities between the liability of a municipal corporation for the acts of its servants, agents, officers, or employes done in the exercise of powers and duties granted to or imposed upon it as a mere agency of the state and performed exclusively for public governmental purposes, and acts done in the exercise of powers granted to or privileges conferred for its own profit, advantage, and ²⁸⁸ emolument, although inuring incidentally to the public. This distinction, though a very shadowy one at times, and though much difficulty has been experienced by the courts in determining within which class a particular case should be placed, nevertheless is well settled, and has governed the decision in many cases. It is alluded to by Mr. Justice Strahan in *Caspary v. Portland*, 19 Or. 496, 20 Am. St. Rep. 842, and is very clearly stated by Folger, J., in *Maximilian v. Mayor of New York*, 62 N. Y. 160, 164, 20 Am. Rep. 468: "There are two kinds of duties which are imposed upon a municipal corporation," he says. "One is of that kind which arises from a grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public, and is used for public pur-

poses. . . . The former is not held by the municipality as one of the political divisions of the state; the latter is. In the exercise of the former power and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for a failure to use its power well, or for an injury caused by using it badly. But where the power is intrusted to it as one of the political divisions of the state, and is conferred, not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser, nor for misuser by the public agents." Accordingly, it has been held that municipal corporations are not responsible for the negligence or wrongful acts of health officers or boards of health: *Bryant v. St. Paul*, 33 Minn. 289, ²⁹⁰ 53 Am. Rep. 31; *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Brown v. Vinalhaven*, 65 Me. 402, 20 Am. Rep. 709; *Barbour v. Ellsworth*, 67 Me. 294; or of employes of the commissioners of public charities and correction: *Maxmilian v. Mayor of New York*, 62 N. Y. 160, 20 Am. Rep. 468; or of officers or members of their fire or police departments: *Hafford v. New Bedford*, 16 Gray, 297; *New Orleans v. Abbagnato*, 23 U. S. App. 533; 62 Fed. Rep. 240; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Burrill v. Augusta*, 78 Me. 118, 58 Am. Rep. 788; *Wilcox v. Chicago*, 107 Ill. 334, 47 Am. Rep. 434; *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 461; *Elliott v. Philadelphia*, 75 Pa. St. 347, 15 Am. Rep. 591; *Gillespie v. Lincoln*, 35 Neb. 34; *Calwell v. Boone*, 51 Iowa, 687, 33 Am. Rep. 154; nor for the negligent construction, maintenance, or use of appliances for the extinguishment of fires: *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760; *Springfield etc. Ins. Co. v. Keeseville*, 148 N. Y. 46, 51 Am. St. Rep. 667; *Edgerly v. Concord*, 62 N. H. 8, 13 Am. St. Rep. 533; *Tainter v. Worcester*, 123 Mass. 311, 25 Am. Rep. 90; or for an injury caused by a negligent defect in a school building: *Ham v. Mayor of New York*, 70 N. Y. 459; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; or for an injury received by the giving way of the floor of a town house used for holding town meetings and other public purposes: *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302.

But when a special power or privilege is conferred upon or granted to a municipal corporation, to be exercised for its own advantage or emolument, and not as a ²⁹⁰ mere governmental agency, it is liable to the same extent as an individual

or a private corporation for negligence in managing or dealing with the property rights or franchises held by it under such grant. Thus if, in repairing a building belonging to the city, and used in part for municipal purposes, and in considerable part also as a source of revenue to the corporation, the agents and servants of the city dig a hole in the ground adjoining, and negligently leave it open and unguarded, so that a person rightfully walking on a path leading by the building, although not a public highway, falls into such hole, and is injured, the city will be liable to an action at common law for the injury: *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485. So, also, when the city owns a wharf, and receives and charges wharfage for its use, it is bound the same as a private individual to use ordinary care and diligence in keeping it safe and free from obstruction, and is liable in an action at common law for damages done to a vessel by reason of neglect of such duty: *Petersburg v. Applegarth*, 28 Gratt. 321, 26 Am. Rep. 357; *Pittsburgh City v. Grier*, 22 Pa. St. 54, 60 Am. Dec. 65; *Mersey Docks Board v. Gibbs*, 11 H. L. Cas. 686. In accordance with this distinction, it is quite universally held that when a municipal corporation voluntarily undertakes to construct and maintain water or gas works in pursuance of statutory authority, for the purpose of supplying the inhabitants thereof with water or gas at rates established by the city, it is liable for an injury in consequence of its acts in constructing and maintaining such works, the same as a private corporation or individual. "A municipal corporation, owning waterworks or gasworks which supply private consumers on the payment of tolls," says Mr. Dillon, "is liable for the negligence of ²⁹¹ its agents and servants the same as like private proprietors would be": 2 Dillon on Municipal Corporations, sec. 954.

The doctrine is well stated by Lewis, C. J., in *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. St. 183, 72 Am. Dec. 730, in speaking of a municipal corporation as the owner of gasworks. "The supply of gaslight," he says, "is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it.

Blending the two powers in one grant does not destroy the clear and well-settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." To the same effect, see, also, *Bailey v. Mayor of New York*, 3 Hill, 531, 38 Am. Dec. 669; *Hand v. Brookline*, 126 Mass. 324; *Perkins v. Lawrence*, 136 Mass. 305; *Stoddard v. Winchester*, 157 Mass. 567; *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434; *San Francisco Gas Co. v. San Francisco*, 9 ²⁹² Cal. 453; *Scott v. Manchester*, 2 Hurl. & N. 204; 2 Beach on Public Corporations, sec. 1140; 1 Dillon on Municipal Corporations, 3d ed., sec. 58. Unless, therefore, there is something in the facts of this case to take it out of the general rule, the liability of the defendant to persons injured by the negligent manner in which the waterworks in question were constructed or are maintained cannot be questioned.

2. The argument of the defendant on the second point is, that although the works in fact belonged to the city, and were paid for with funds derived from the sale of its bonds, they were built in pursuance of a public duty, involuntarily imposed upon the municipality by express legislative mandate, and therefore are owned and controlled by the city as a public or governmental agency, and not in its private or proprietary capacity; and also that the committee under whose direction and supervision the works were constructed and are now operated and maintained is an independent body appointed by and acting as an agent of the state, over which the city has no control, and for whose negligence it is not responsible. In support of the position that the works belong to the city in its public, as distinguished from its private, capacity, reliance is had principally upon the decision of this court in *David v. Portland Water Committee*, 14 Or. 98. That was a suit brought by a resident and taxpayer to restrain the water committee named in the act of 1885 from issuing and disposing of the bonds of the municipality, and constructing waterworks in pursuance of such act,

on the ground that it was unconstitutional and void, and would unlawfully impose a burden upon the taxpayers of the city. The only ruling in that case which has any bearing upon the question now before us was that, under the circumstances, the supplying of the city of Portland and its inhabitants with water which had to be brought ²⁹³ by means of pipes from some place outside of the city was not so essentially a private purpose that the legislature could not constitutionally appoint the agents of the city for the construction of such works. But it does not follow from this view that the works, when constructed, would not belong to the city in its private or corporate capacity. Indeed, the entire reasoning of the opinion permits the clear inference, it seems to us, that the court never lost sight of the fact that they would be the property of the city, but notwithstanding this, concluded that the object sought to be accomplished was so impressed with a public purpose that the determination of the legislature as to the necessity for such an enterprise, and its selection of the agents of the city by whom the work should be undertaken, was valid, and conclusive upon the courts. The act authorizing the construction of the works and appointing the committee to have control thereof became a part of the charter of the city. Under it the city alone was authorized and empowered to construct and maintain them. The money therefor was to be raised by the sale of its bonds, and the court expressly held in the David case that the members of the water committee were "no more than agents of the city required by the act to carry out its provisions," and should not be regarded as officers. So we conclude that there is nothing in the doctrine of that case to exempt the city of Portland from the general rule which applies to all municipal corporations owning and operating waterworks for the purpose of supplying its inhabitants with water for hire on the theory that the works are owned by it in its public or governmental, as distinguished from its private, capacity.

3. Nor do we concur in the position that the city is not liable for the negligent acts of the water committee and its servants and employes under the doctrine of ²⁹⁴ respondeat superior. It is true this doctrine is grounded upon the right of an employer to select his servants, and discharge them if careless, unskillful, or incompetent, and to direct and control them while in his employ. But, whatever may have been the legal relation of the water committee to the city prior to the

consolidation act of 1891, it is clear that thereafter it became as much the agent or representative of the municipality, within the scope of the powers conferred upon it, as any other officer or agent provided for in the charter. When the people of the cities of Portland, East Portland, and Albina by popular vote accepted the charter of 1891, containing, in substance, the same provisions as the act of 1885 creating and naming the water committee, and vesting in it and a commission thereafter to be appointed the power to construct, manage, and control the water system belonging to the city, they must be deemed to have thus accepted such committee and commission as their agents to carry out the work. By the terms of the charter, the water committee and commission are made agents or representatives of the municipality as much as the mayor, common council, or any other officer provided for therein. Each of these officers or agents is charged with the performance of certain municipal duties, and it takes all of them to constitute the corporation. The inhabitants within certain described territory were, by the act of 1891, created a municipal corporation, with certain defined rights, powers, privileges, and duties, to be exercised by agents and officers provided for in the act of incorporation. And it cannot be said that one of the officers thus provided for is any more the agent or representative of the municipality than the other. Nor is the manner of their appointment, if valid, of any consequence in determining their representative capacity. The legislature, in the exercise of its plenary powers over municipal ²⁸⁵ corporations, thought best to provide that certain powers which it granted to the city of Portland should be exercised by officers and agents of its own selection. This legislation was held valid in *David v. Portland Water Committee*, 14 Or. 98, but it does not make the agent so selected any the less the representative of the municipality. The power and authority given to the water committee by the charter is not, as counsel seem to think, exclusive of the city, but only exclusive of any other agent or officer of the city. The right and power to construct and maintain waterworks is expressly vested in the municipality. Its exercise is devolved by the charter upon the water committee. But this is a duty which they discharge, not for themselves, nor for the public generally, but for the city.

4. As said by Earl, J., in *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622, in discussing the liability of a city for an injury received in consequence of a defective street, which

was under the exclusive control of a commission whose duties were prescribed and defined by the charter: "The city must act through officers and agents, and it is for the legislature to determine what powers and duties shall be devolved upon them. It matters not how ample or exclusive their powers may be, nor how independently they may act, nor how they are chosen. If they are provided by law, and authorized to discharge a corporate duty which rests upon the municipality, then, in the discharge of that duty, they represent the municipality, and it may be chargeable with their misfeasance and nonfeasance. . . . To determine whether there is municipal responsibility, the inquiry must be whether the department whose misfeasance or nonfeasance is complained of is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty or charged with a ²⁹⁶ duty primarily resting upon the municipality. For these views the cases of *Bailey v. New York*, 3 Hill, 538, 38 Am. Dec. 669, 2 Denio, 433, and *Barnes v. District of Columbia*, 91 U. S. 540, are ample authority, and the case of *Richards v. New York*, 16 Jones & S. 315, is a precise authority."

The cases of *Bailey v. New York*, 3 Hill, 538, 38 Am. Dec. 669, 2 Denio, 433, and *Barnes v. District of Columbia*, 91 U. S. 540, referred to by Mr. Justice Earl, are very much in point in the present discussion. In the former an action was brought against the city of New York by one who had been injured in his property by the careless construction of a dam across Croton river at a point about forty miles distant from the city, for use as a part of the system for supplying the city and its inhabitants with water. The work was constructed under the control of water commissioners appointed by the governor, and in whose appointment the city had no voice; and it was contended there, as here, that the defendant was not chargeable for negligence or unskillfulness in the construction of the dam, because the commissioners were acting in a public capacity, and, like other public agents, not responsible for the misconduct of those necessarily appointed by them; and also on the ground that, inasmuch as the water commissioners were not appointed by the city, nor subject to its direction or control, it was not liable for their conduct. But Mr. Justice Nelson, in an opinion which, although it has been somewhat criticised, has stood the test of time, and is now generally regarded as sound, disposes of both of these objections in such a clear and lucid way as to leave but little to be said upon the subject. Examining

the position that, "admitting the water commissioners to be the appointed agents of the defendants, still the latter are not liable, inasmuch as they were acting solely for the state in prosecuting the work in question, and therefore ²⁹⁷ are not responsible for the conduct of those necessarily employed by them for that purpose," he says: "We admit, if the defendants are to be regarded as occupying this relation, and are not chargeable with any want of diligence in the selection of agents, the conclusion contended for would seem to follow. They would then be entitled to all the immunities of public officers charged with a duty which, from its nature, could not be executed without availing themselves of the services of others; and the doctrine of respondeat superior does not apply to such cases. If a public officer authorize the doing of an act not within the scope of his authority, or if he be guilty of negligence in the discharge of duties to be performed by himself, he will be held responsible; but not for the misconduct or malfeasance of such persons as he is obliged to employ. . . . But this view cannot be maintained upon the facts before us. The powers conferred by the several acts of the legislature authorizing the execution of this great work are not, strictly and legally speaking, conferred for the benefit of the public. The grant is a special, private franchise, made as well for the private emolument and advantage of the city as for the public good. The state, in its sovereign character, has no interest in it. It owns no part of the work. The whole investment under the law, and the revenue and profits to be derived therefrom, are a part of the private property of the city—as much so as the lands and houses belonging to it situate within its corporate limits. The argument of the defendants' counsel confounds the powers in question with those belonging to the defendants in their character as a municipal or public body, such as are granted exclusively for public purposes to counties, cities, towns, and villages, where the corporations have, if I may so speak, no private estate or interest in the grant. As the powers ²⁹⁸ in question have been conferred upon one of these public corporations, thus blending in a measure those conferred for private advantage and emolument with those already possessed for public purposes, there is some difficulty, I admit, in separating them in the mind, and properly distinguishing the one class from the other, so as to distribute the responsibility attaching to the exercise of each. But the distinction is quite clear and well settled, and the process of separation practicable.

To this end regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, quoad hoc, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred."

And in answer to the objection that the commissioners were the agents of the state, and not the city, he says: "We have already given our views of the character of this work, and of the capacity in which the defendants hold the powers under which it has been executed. If we are not mistaken in that conclusion, and they are to be regarded as a private company, like any other body of men upon whom special franchises have been conferred for their own private advantage, such as banking and railroad corporations, then the appointment of the agents by the state did not make them less the agents of the defendants. The appointment in this way is but one of the conditions upon which the charter was granted, and stands on the footing of any other condition to be found ²⁹⁹ in the grant, subject to which it has been accepted. By accepting the charter, the defendants thereby adopted the commissioners as their own agents to carry on the work."

Barnes v. District of Columbia, 91 U. S. 540, was an action brought to recover damages for a personal injury received by the plaintiff in consequence of the defective condition of one of the streets of the city of Washington. By the act creating the municipal corporation of the District of Columbia it was provided that there should be a board of public works, composed of the city governor and four other persons, to be appointed by the president, with the consent of the senate, who should have entire control of, and make all regulations which they shall deem necessary for, keeping in repair the streets, avenues, and alleys of the city; and the principal defense in the case was that, in view of these provisions, the municipality was not liable for the negligence of such board. But it was held that a municipal corporation, in the exercise of its duties, is a mere department of the state, having such powers as the state may, from time to time, at its pleasure, confer, and that

it can act only by its agents and servants; but this does not mean or imply that the acts must be done by inferior or subordinate agents, but, on the contrary, the higher the authority of the agent, the greater is the responsibility of the principal. Mr. Justice Hunt, in speaking for the court, says: "A municipal corporation may act through its mayor, through its common council, or its legislative department, by whatever name called, its superintendent of streets, commissioner of highways, or board of public works, provided the act is within the province committed to its charge. Nor can it, in principle, be of the slightest consequence by what means these several officers are placed in their position—whether they are elected by the people of the municipality, ³⁰⁰ or appointed by the president or a governor. The people are the recognized source of all authority, state and municipal; and to this authority it must come at last, whether immediately or by a circuitous process. An elected mayor or an appointed mayor derives his authority to act from the same source, to wit, that of the legislature. The whole municipal authority emanates from the legislature. Its legislative charter indicates its extent, and regulates the distribution of its powers, as well as the manner of selecting and compensating its agents. The judges of the supreme court of a state may be appointed by the governor, with the consent of the senate, or they may be elected by the people. But the powers and duties of the judges are not affected by the manner of their selection. The mayor of a city may be elected by the people, or he may be appointed by the governor, with the consent of the senate; but the slightest reflection will show that the powers of this officer, his position as the chief agent and representative of the city, are the same under either mode of appointment. Whether his act in a case in question is the act of and binding on the city depends upon his powers under the charter to act for the city, and whether he has acted in pursuance of them, not at all upon the manner of his election. It is equally unimportant from what source he receives compensation, or whether he serves without it." These authorities would indicate the true rule to be that the responsibility of the municipality for the acts of its officers or agents does not depend upon the manner of their appointment, but upon the duty devolved upon them. If such duty appertains to mere political or governmental affairs, the municipality is not liable; but if it pertains to the private affairs

of the corporation, it is liable for their negligence, the same as a private individual.

³⁰¹ Our attention is especially called by the defendant's counsel to the cases of *Maxmilian v. Mayor of New York*, 62 N. Y. 160, 20 Am. Rep. 468, *Ham v. Mayor of New York*, 70 N. Y. 459, and *Springfield etc. Ins. Co. v. Keeseville*, 148 N. Y. 46, 51 Am. St. Rep. 667. But, as pointed out by Mr. Justice Earl in *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622, the *Maxmilian* and *Ham* cases were actions brought against the city for the negligence of employes of certain boards and commissions who were not engaged in the discharge of any duty which rested upon the city. And *Springfield etc. Ins. Co. v. Keeseville*, 148 N. Y. 46, 51 Am. St. Rep. 667, was an action to recover damages for a failure to keep the water system belonging to the city in condition to furnish protection from fires, and was defeated on the ground that the use of waterworks for the extinguishment of fire was a public, and not a private, purpose—a distinction which is quite clearly pointed out in *Edgerly v. Concord*, 62 N. H. 8, 13 Am. St. Rep. 533, which was an action brought to recover damages for an injury received through the negligent use of a fire hydrant by the officers and agents of the city. We conclude, therefore, that the city of Portland is liable for the negligent act of the water committee charged in the complaint, notwithstanding the fact that its members were appointed by the legislature, and are independent of the control of any other department of the city government.

5. And this brings us to the question as to whether there was sufficient evidence of negligence on the part of the servants or employes of the committee to carry the case to the jury. The evidence on behalf of the plaintiff was to the effect that the pipe in question was laid in 1892, by the water committee, and connected with the general water system of the city; that it burst twice, prior to the time of the accident which caused ³⁰² the injury to plaintiff's goods, under an ordinary pressure; that at the time of the accident there was no unusual or extraordinary pressure upon the pipe, or reason why it should have burst at that time. The evidence further shows that a water pipe of its size and dimensions, when properly constructed and laid, will not ordinarily burst under such a pressure; and these circumstances, in our opinion, were sufficient to carry the case to the jury.

6. As a general proposition, a party who alleges negligence as a cause of action must, of course, prove it; but under some circumstances the accident itself and the consequent injury may be of such a nature as to raise a presumption of negligence, and thus cast upon the defendant the duty of showing that he was free from fault. The rule seems to be that whenever a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from a want of care: *Scott v. London Docks Co.*, 3 Hurl. & C. 596. And to the same effect, see 1 *Shearman and Redfield on Negligence*, secs. 59, 60; *Thompson on Negligence*, 1230; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Warren v. Kauffman*, 2 Phila. 259; *Huey v. Gahlenbeck*, 121 Pa. St. 238, 6 Am. St. Rep. 790, note. It follows from these views that the judgment of the court below must be reversed and a new trial ordered.

MUNICIPAL CORPORATIONS—OBLIGATIONS OF A PRIVATE NATURE—NEGLIGENCE—LIABILITY.—A municipality, with respect to the private character of its powers and obligations is subject to the same rule of liability as an individual: *New Orleans v. Kerr*, 50 La. Ann. 413, 69 Am. St. Rep. 442. A city, as a private owner of property, is liable to the same extent as an individual: *Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114; *Gibson v. Huntington*, 38 W. Va. 177, 45 Am. St. Rep. 853.

MUNICIPAL CORPORATIONS—NEGLIGENCE OF OFFICERS OR AGENTS.—THE LIABILITY of a city or town for the negligence of its officers or agents depends upon whether it is exercising governmental duties, or powers and privileges conferred for its own benefit. In the former case, it is not answerable; in the latter, it is: *Moffitt v. Asheville*, 103 N. C. 237, 14 Am. St. Rep. 810. It is answerable where the corporation, as a corporation, is exercising its private franchise powers and privileges which belong to it for its immediate corporate benefit, or is dealing with property held by it for its corporate advantage, gain, or emolument, though inuring ultimately to the benefit of the general public: *Wright v. City Council*, 73 Ga. 241, 6 Am. St. Rep. 256; note to *McMahon v. Dubuque*, 70 Am. St. Rep. 149. Compare the monographic note to *Goddard v. Harpswell*, 30 Am. St. Rep. 376, on the liability of cities for the negligence and other misconduct of their officers and agents.

MUNICIPAL CORPORATIONS—NEGLIGENCE AS TO WATERWORKS—LIABILITY.—A city is answerable for the negligence of its water commissioners, or other officers or agents intrusted with the duty of planning and keeping in repair a system of waterworks: Note to *Goddard v. Harpswell*, 30 Am. St. Rep. 400. The water commissioners of New York are agents of the city, for whose acts the municipality is answerable, though selected by the governor and senate, and not subject to control or removal by the

city: *Bailey v. Mayor*, 3 Hill, 531, 38 Am. Dec. 609. For a contrary view, see *Gross v. Portsmouth*, 68 N. H. 266, 73 Am. St. Rep. 586. Where the board of water commissioners is one of the instrumentalities of the government of the city, the municipality is liable for its negligent acts: *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442; and see *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434.

NEGLIGENCE—PRESUMPTION OF, FROM HAPPENING OF ACCIDENT.—Negligence is presumed from the happening of an accident, if injury occurs in consequence of something which the defendant did or did not do, and which it was his duty to do or not to do. There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care: Note to *Carroll v. Chicago etc. R. R. Co.*, 67 Am. St. Rep. 874.

BANK OF COLFAX v. RICHARDSON.

[34 OREGON, 518.]

JUDGMENT—COLLATERAL ATTACK—WANT OF JURISDICTION.—Errors or irregularities in the record of a superior court cannot be collaterally attacked unless they show a want of jurisdiction.

ACTIONS AGAINST NONRESIDENTS—PREREQUISITE TO JURISDICTION.—In an action against a nonresident on a money demand, a seizure of the defendant's property by attachment is not a statutory prerequisite to jurisdiction, but is wholly a judicial requirement.

ATTACHMENT OF NONRESIDENT'S PROPERTY—JURISDICTION—COLLATERAL ATTACK.—A judicial requirement, in an action on a money demand against a nonresident, that any property to be affected by the adjudication must be brought under the control of the court, in the first instance, by attachment, is satisfied, and the court acquires sufficient jurisdiction of the res to protect its proceeding from collateral attack, when the property of the defendant has been actually brought within the power and control of the court by a seizure under a lawful attachment, although there may be irregularities or even error in the attachment proceedings.

ACTIONS AGAINST NONRESIDENTS—WHAT GIVES JURISDICTION.—In an action on a money demand against a nonresident, where he does not appear and has not been served with process within the territorial limits of the court, the authority of the court to hear and proceed to judgment depends upon the service of process by publication and the actual attachment of property to be concluded by the judgment, and not upon the regularity of the attachment proceedings.

JUDGMENT AGAINST NONRESIDENT—COLLATERAL ATTACK—DEFECTIVE ATTACHMENT.—In an action against a nonresident, the judgment of a superior court against him cannot be collaterally attacked for any defect in the attachment proceedings therein, where the statute does not make such proceedings

jurisdictional, unless the record affirmatively shows a want of jurisdiction.

JUDGMENT AGAINST NONRESIDENT—COLLATERAL ATTACK—ISSUANCE OF SUMMONS.—The judgment in a proceeding by attachment against a nonresident cannot be collaterally attacked on the ground that the record does not affirmatively show that a summons was issued in the action at or before the issuance of the writ of attachment.

ATTACHMENT—RETURN—SUFFICIENCY OF—UNOCCUPIED REAL PROPERTY—LEAVING COPY IN "CONSPICUOUS" PLACE.—When an officer, in attaching real property where there is no occupant, is required by statute to leave a copy of the writ in a "conspicuous" place thereon, and certifies that he has done so, his return is sufficient, when the judgment in the main action is questioned collaterally, without pointing out the particular place where the copy was left.

ATTACHMENT—RETURN—SUFFICIENCY OF—OWNERSHIP OF PROPERTY.—An omission in the return on an attachment of real property to state that the land attached was the property of the defendant in the writ does not render the return insufficient upon a collateral attack.

ATTACHMENT—RETURN—SUFFICIENCY OF—ABSENCE OF OCCUPANT.—When real property is attached and the return recites that there was "no occupant thereof on the premises," this is sufficient to show that the premises were unoccupied at the time they were attached, and the return should not be construed to mean that the premises were actually occupied, but that the occupant was temporarily absent at the time of the officer's visit.

ATTACHMENT—LEVY UPON UNOCCUPIED REAL PROPERTY—WHEN VALID.—Under a statute which provides that real property may be attached, where there is no occupant, by leaving a copy of the writ in a "conspicuous" place thereon, a valid attachment of such property may be so made if the officer, at the time of his levy, cannot find anyone visibly occupying the land.

ATTACHMENT—LEVY—"LEAVING COPY" OF WRIT—WHAT IS.—If an officer, in attaching unoccupied real property, is required by statute to leave a copy of the writ in a conspicuous place thereon, it must be held, in a collateral attack upon the judgment in the main action, that the "posting" of the copy in such place is sufficient.

PROCESS—ORDER FOR PUBLICATION—SUFFICIENCY OF AFFIDAVIT.—In an action against a nonresident, an affidavit reciting that an attachment has been levied on certain real property of the defendant, in a certain county in the state, naming it, sufficiently shows that he has property within the state. Hence, such affidavit is sufficient, on a collateral attack, to sustain an order for publication of the summons.

PROCESS—ORDER FOR PUBLICATION—AFFIDAVIT AS TO RESIDENCE—SUFFICIENCY OF.—An affidavit for the publication of summons, which states that the defendant resides in another state, naming it, and that he is not within the state where suit is brought, shows that the defendant cannot be served within the state, and is, therefore, sufficient as against a collateral attack.

PROCESS—ORDER FOR PUBLICATION—NECESSITY OF RETURN, "NOT FOUND."—A return of summons, "not found," is not essential to a valid order for service by publication, under a statute which provides that the fact that the defendant cannot be found shall appear by affidavit.

PROCESS—ORDER FOR PUBLICATION—CONSTRUCTION OF STATUTES.—A statute which merely gives a right to proceed by the publication of summons does not affect a statute which prescribes the method of such procedure.

PROCESS—ORDER FOR PUBLICATION—MAILING SUMMONS “FORTHWITH.”—Although a statute provides that an order for the publication of summons shall direct that a copy of the complaint and summons be deposited forthwith in the postoffice, addressed to the defendant, the omission of the word “forthwith” from such an order is not regarded, on collateral attack, as fatal to the proceedings, when it appears that the copies were in fact mailed within a reasonable time after the date of the order.

PROCESS.—A SUMMONS IS MAILED “FORTHWITH.” within the meaning of a statute which requires such mailing, when it is deposited in the postoffice on the day that the summons is first published, if such publication itself is made within a reasonable time after the date of the order, as in the first weekly issue of the newspaper following such date.

JUDGMENT—COLLATERAL ATTACK—PROOF OF SERVICE OF SUMMONS.—A judgment is not invalid, on collateral attack, simply because the proof of service of the summons is not annexed to, or indorsed on, the summons itself.

PROCESS—ORDER FOR PUBLICATION—DEPOSIT OF COPIES—WHO MAY MAKE CERTIFICATION.—It is not required that the proof of a deposit of the complaint and summons in the postoffice, pursuant to an order for service by publication, shall be made by the sheriff or his deputy, or by a person specially appointed for that purpose. It may be made by anyone competent to make the required proof, and it is not necessary that the copy of the summons so deposited should be certified.

JUDGMENT—COLLATERAL ATTACK—NONAPPEARANCE OF ORIGINAL SUMMONS IN JUDGMENT-ROLL.—If the proof of publication of summons, as well as the findings and recitals in the judgment, show that a summons was issued, the judgment will not be held void, upon collateral attack, because the original summons does not appear in the judgment-roll.

ATTACHMENT.—REAL PROPERTY FRAUDULENTLY CONVEYED by a debtor is subject to attachment.

FRAUDULENT CONVEYANCES—GOOD FAITH—BURDEN OF PROOF.—If a conveyance from an insolvent debtor to his children and the circumstances under which it was made bear the semblance of an attempt to cover up the grantor's property, and his creditors bring suit to set aside the conveyance as a fraud upon them, the burden is upon the defendants to show that the conveyance was made in good faith and for a valuable consideration, particularly where they ought to be able to point out definitely the various items going to make up the indebtedness constituting the alleged consideration for the conveyance.

Suit by the bank against A. C. Richardson and others to set aside a conveyance as fraudulent and to subject the property to the payment of certain judgments. The plaintiff obtained a decree and the defendants appealed.

Lawrence Flinn, John Burnett, and Arthur L. Frazer, for the appellants.

Cox, Cotton, Teal & Minor and Wirt Minor, for the respondent.

³²¹ BEAN, J. This is a suit to set aside a conveyance from A. C. and Laura R. Richardson to their minor children of certain lands in Benton county, on the ground that it was made for the purpose of defrauding creditors, and especially this plaintiff. The complaint avers, in effect, that on April 21, 1894, the plaintiff commenced three actions in the circuit court of Multnomah county—one against the defendant, A. C. Richardson, another against him and his wife, Laura R. Richardson, and the third against him and one J. T. Dook—to recover upon promissory notes of the respective defendants, and caused the real property in question to be attached in each of such actions; that such proceedings were had therein that the plaintiff recovered judgments against the defendants, wherein it was ordered that the property attached be sold, and the proceeds applied to the payment thereof; that a few days before the commencement of such actions, and after the indebtedness upon which they were based had accrued, the defendants, A. C. and Laura R. Richardson, with intent to injure and defraud the plaintiff, and without any consideration, conveyed the premises in question to their ⁵²² minor children, who are made defendants in this suit. The answer puts in issue the material allegations of the complaint, and alleges that the conveyance referred to was made for a valuable consideration, and in payment of a debt due from the grantors to the grantees. At the time the several actions referred to in the pleadings were commenced and the judgments therein rendered, the Richardsons were nonresidents of the state, and service of the summons was had upon them by publication.

The plaintiff, at the trial, to maintain the issues on its part, and to prove the existence of the several judgments and orders of sale as alleged, offered in evidence copies of the complaint, affidavit, and undertaking on attachment, writ of attachment and return thereon, affidavit and order for publication of summons, proof of publication and of deposit in the postoffice, and the judgment in each of such actions, to the admission of which the defendants objected for the reasons that: 1. It does not affirmatively appear in either case, except in the affidavits for an order of publication, that a summons was issued at the time or before the writ of attachment; 2. It does not appear that the writs of attachment were served

as required by law, or that the court obtained jurisdiction to direct the service of the summons by publication; 3. It does not appear that the proceedings for the publication of the summons were regular, or that the summons was ever issued or served in the manner required by law. These objections were overruled, and the records admitted in evidence, and of this ruling the defendants complain.

The argument in support of the first objection is that, the judgments in question having been rendered against nonresidents of the state upon service of the summons by publication, the facts essential to the jurisdiction must affirmatively appear upon the face of the record, ⁵²³ and, since an attachment of the property of a nonresident is, under the doctrine of *Pennyroyer v. Neff*, 95 U. S. 714, a necessary preliminary jurisdictional step in such cases, the record must affirmatively show, even on a collateral attack, that all the requirements of the statute in reference to the issuance and levy of attachment have been strictly complied with; and, as the writ cannot regularly issue before the summons (*White v. Johnson*, 27 Or. 282, 50 Am. St. Rep. 726), it is claimed that the judgments in question are void, because it does not affirmatively appear from any competent evidence that the summons had, in fact, been issued at the date of the writ.

1. If this question were here on appeal from the judgments of the circuit court of Multnomah county, we might not find it easy to affirm them on satisfactory grounds; but we occupy no such position. The records are introduced collaterally as evidence to sustain the allegations of the complaint in the suit now pending, and we cannot, therefore, disregard them, or refuse to give effect to the judgments, on any other grounds than a want of jurisdiction in the court which rendered them. Any errors or irregularities in the records are of no avail in this proceeding unless they be such as show that the court had no jurisdiction. Our inquiry, therefore, must be confined to the question as to whether the error alleged affects the jurisdiction of the court, and in its consideration it is proper to bear in mind that there is no statute of this state making the seizure under an attachment or otherwise of the property of a nonresident an essential or necessary jurisdictional prerequisite in an action against him. We are not called upon, therefore, to consider the effect of the failure of the record in such an action to affirmatively show that all the statutory jurisdictional requirements have been complied with, ⁵²⁴ although

even in such case the presumptions in favor of jurisdiction will often be sufficient to sustain the judgment when collaterally assailed: *Applegate v. Lexington etc. Min. Co.*, 117 U. S. 255.

2. The rule requiring the property of a nonresident in an action on a money demand to be seized under a writ of attachment, and thus brought under the control of the court, before any steps are taken looking to the publication of the summons, is wholly a judicial, and not a legislative, requirement.

3. By the ruling in *Pennoyer v. Neff*, 95 U. S. 714, the proceedings in such an action, even if they conform strictly in every particular to the requirements of the statutes of this state, are ineffectual unless some property of the defendant in the state is brought, at the inception of the case under the control of the court, and subject to its disposition by a writ of attachment or other process adopted for that purpose; and then only to the extent of adjudging that the property so seized is liable for the satisfaction of plaintiff's demand. In other words, the effect of that decision is that an action against a nonresident, who is not personally served with process within the territorial limits of the court, or does not appear in the action, is substantially and to all intents and purposes a proceeding in rem, and therefore the property to be affected by the adjudication must be brought under the control of the court in the first instance by an attachment, or some other equivalent act. The soundness of this doctrine is, of course, not to be questioned, but, in our opinion, its requirements are satisfied, and the court acquires sufficient jurisdiction of the res to protect its proceeding from collateral attack, when the property of the defendant has been actually brought within the power and control of the court by a seizure under a lawful writ⁵²⁵ of attachment issued in the action, although there may be irregularities, or even error, in the attachment proceedings.

4. Under our system, an attachment is merely auxiliary to the main action, and there is no difference in the proceedings thereon in an action brought against a nonresident, upon whom service is necessarily made by publication, and in one brought against a resident of the state, in which personal service is had. In either case the proceedings on attachment have nothing to do with the merits of the cause of action or the jurisdiction of the court to try and determine the controversy between the parties. If personal service is had, the cause becomes a mere action in personam, with the added in-

cident that the property attached remains liable for any judgment the plaintiff may recover. But, if service is had by publication, and there is no appearance for the defendant, the action is practically a proceeding in rem against the attached property, the only effect of which is to subject it to the payment of the amount which the court may find due the plaintiff. Where no personal service is had, the res is brought within the power and control of the court by a seizure under a writ of attachment, but the right to adjudicate thereon is acquired only by the publication of the summons. It is the substituted service, and not the seizure, which gives the court jurisdiction to establish by its judgment a demand against the defendant, and to subject the property brought within its custody to the payment of that demand. In other words, the authority to hear and proceed to judgment depends upon the service of the process and the actual seizure of the thing to be concluded by the judgment, and not upon the regularity of the proceedings by which the control of the property was acquired. When, therefore, the court has the de facto custody of the property by virtue of a de facto ⁵²⁶ writ of attachment, and a right to determine whether such property shall be subject to the payment of plaintiff's demand by virtue of constructive service of process, it has full and complete jurisdiction in the premises, and subsequent errors or irregularities in the proceedings will not be available on collateral attack. A judgment founded on service of process by publication is, of course, ineffectual unless it is an adjudication concerning property which the court has in its custody under some lawful process, because there is nothing upon which it can operate; but where the property has been actually seized and brought within the control of the court by some process authorized by law, and the right to determine its liability for the demands of the plaintiff is subsequently acquired by publication, an error of the court in determining the status of the property, or its liability, or the validity of the attachment, can, it seems to us, no more affect the jurisdiction, under a statute like ours, than an erroneous decision as to the amount of plaintiff's demand, or any other error in the case: *Van Fleet on Collateral Attack*, secs. 257, 838; *Paul v. Smith*, 82 Ky. 451; *Barelli v. Wagner*, 5 Tex. Civ. App. 445; *Thompson v. Eastburn*, 16 N. J. L. 100; *Diehl v. Page*, 3 N. J. Eq. 143.

5. There is much conflict in the authorities generally as to whether the statutory prerequisites to the issuance of writs

of attachment are jurisdictional, and must affirmatively appear to protect the proceedings from collateral attack, or whether, in the absence of any showing in the record to the contrary, it will be presumed that the steps necessary to vest the court with jurisdiction were taken. Mr. Waples states with apparent confidence that all the statutory requirements are jurisdictional, and are not to be presumed after judgment, even on a collateral attack, and cites a large number of cases ⁵²⁷ which more or less directly support the text (Waples on Attachment, sec. 625); while Mr. Works, with equal confidence, says that, while there are authorities holding that such proceedings are special, and that no presumptions in favor of the jurisdiction of the court can be indulged, "the clear weight of authority and reason is to the contrary": Works on Courts and Juries, 547; and this seems to be the view of Judge Van Fleet, as will be seen by reference to the citation from his work on Collateral Attack, already made. An examination of the cases cited, however, will show that they are based largely, if not entirely, upon the peculiar provisions of the statute under consideration by the court, and it is, therefore, practically impossible to deduce from them any general rule upon the subject; and it is unnecessary for us in this case to attempt to do so, for, as we have already intimated, the necessity for an attachment, in the first instance, in an action brought in this state against a nonresident, is the outgrowth entirely of a decision of the supreme court of the United States, and not of any statute law or decision of this state; and we therefore feel justified in following the adjudications of that court to the effect, as we understand them, that the judgment of a superior court against a nonresident cannot be attacked collaterally for any defect in the attachment proceedings, where such proceedings are not made, by statute, jurisdictional, unless the record affirmatively shows a want of jurisdiction.

In the leading case of *Galpin v. Page*, 18 Wall. 350, in which it is held that, where a judgment of a superior court relating to a matter falling within the general scope of its powers is produced, jurisdiction will be presumed, in the absence of an affirmative showing to the contrary, but if, in rendering the judgment, the court was not proceeding according to the course of ⁵²⁸ the common law, or the judgment is against a nonresident who was not personally served within the territorial limits of the court, and did not appear in the action, the authority for its rendition must appear upon the face of the record, Mr.

Justice Field says: "The qualification here made, that the special powers conferred are not exercised according to the course of the common law, is important. When the special powers conferred are brought into action according to the course of that law—that is, in the usual form of common-law and chancery proceedings—by regular process and personal service, where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment in rem is sought, the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its general powers."

And this principle was applied in the case of *Voorhees v. Jackson*, 10 Pet. 449, in which the validity of certain proceedings in attachment against a nonresident were called in question collaterally on the ground that the record of the court in which the proceedings were had did not show that an affidavit for an attachment had been made and filed with the clerk before the writ issued, or that notice of the issuing of the attachment had been given by publication, or that the defendant had been called at three different terms of court, and the default recorded, or that the auditors had waited till the expiration of twelve months from the return of the writ before making the sale; all of which were specially required in the act regulating the proceedings under attachment. Now, that was a case of a proceeding in rem, without jurisdiction over the person, where the record produced failed to disclose that certain provisions of the statute material for the protection of the defendant's ⁵²⁹ rights had been complied with, and it was argued by counsel there, as here, that all of these requirements were conditions precedent, which must not only be performed before the court had power to order a sale, but that such performance must appear in the record; but the court, in reply to this argument, said: "The provisions of the law do not prescribe what shall be deemed evidence that such acts have been done, or direct that their performance shall appear on the record. . . . We do not think it necessary to examine the record in the attachment for evidence that the acts alleged to have been omitted appear therein to have been done. Assuming the contrary to have been the case, the merits of the present controversy are narrowed to the single question whether this omission invalidates the sale. The several courts of common pleas of Ohio, at the time of these proceedings, were courts of general jurisdiction, to which was added, by the act

of 1805, power to issue writs of attachment, and order a sale of the property attached, on certain conditions. No objection, therefore, can be made to their jurisdiction over the case, the cause of action, or the property attached. . . . There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears. . . . If the defendant's objections can be sustained, it will be on the ground that this judgment is false, and that the order of sale was not executed according to law, because the evidence of its execution is not of record. The same reason would equally apply to the nonresidence of the defendant within the state, the existence of the debt due the plaintiff, or any other creditor, which is the basis on which the whole proceedings rest."

Again, in *Cooper v. Reynolds*, 10 Wall. 308, ⁵³⁰ where a defect in an affidavit for a writ of attachment, as well as the premature issuing of the writ, was set up to defeat the title to land sold under a judgment in an action against nonresidents who had been served with summons by publication, it was held that jurisdiction of the res was attained by the levy of the writ, and that the errors and irregularities pointed out were of no avail on a collateral attack. Mr. Justice Miller, after discussing the essential principles underlying the jurisdiction of the courts in proceedings by attachment against nonresidents who are not served with process within the territorial limits of the courts, and do not appear in the action, says: "Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely in rem. Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such a writ is returned into court the power of the court over the res is established. The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but, the writ being issued and levied, the affidavit has served its purpose, and, though a revisory court might see

in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon defendant's property." ⁵³¹ This case has been often quoted and approved by the supreme court, and is said in *Matthews v. Densmore*, 109 U. S. 216, 219, to be conclusive in regard to the validity of such proceedings when collaterally assailed. To the same effect, see *Harvey v. Tyler*, 2 Wall. 328; *Ludlow v. Ramsey*, 11 Wall. 581; *Grignon v. Astor*, 2 How. 319.

6. The result of these cases is that the objection that it does not affirmatively appear that a summons was issued in the action brought by the plaintiff against the Richardsons in Multnomah county at or before the issuance of the writ of attachment, is of no avail in this suit.

7. It is next claimed that no valid attachments in such actions were made, and for that reason the court did not acquire jurisdiction of the res, and, therefore, had no power or authority to proceed against the defendants on a service of summons by publication. The statute (Hill's Annotated Laws, sec. 149) provides that: "Real property shall be attached by leaving with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the writ certified by the sheriff"; and the return of the sheriff on the writs of attachment in question is that he executed the same on a certain date, "in Monroe precinct, Benton county, Oregon, by posting a copy of said writ of attachment, prepared and certified to by me, as sheriff of said county, in a conspicuous place on the following described property [being the property in controversy], there being no occupant thereof on the premises." The contention for the defendants is that this return is insufficient, because it does not show the particular place where the copy of the writ was posted, or that the property was attached as the property of the defendants in the action, or that the premises were not in fact occupied at the time the attempted ⁵³² levy was made, or that it was made by leaving a copy of the writ in a conspicuous place on the premises. Where, as in case of the location of a public highway, provision is made by statute for acquiring jurisdiction of the person by notices posted in a public or conspicuous place, it is probably necessary that the proof of posting show the particular places where the notices were posted, so that the court can say whether it was a public place or not. But in case of an officer serving a writ of attachment there is

a natural presumption in favor of the discharge of official duty, and when he is required to post a notice in a conspicuous place, and certifies that he has done so, his certificate is sufficient, when questioned collaterally, without pointing out the particular place where the notice was posted: *Waples on Attachment*, sec. 334; *Porter v. Pico*, 55 Cal. 165; *Davis v. Baker*, 72 Cal. 494; *Lewis v. Quinker*, 2 Met. (Ky.) 284; *Anderson v. Sutton*, 2 Duvall, 480; *Head v. Daniels*, 38 Kan. 1, 10. *Hall v. Stevenson*, 19 Or. 153, 20 Am. St. Rep. 803, is not in conflict with this proposition because: 1. It was not a collateral attack; and 2. The return of the sheriff was held insufficient because it did not show that the person to whom the copy of the writ was delivered was an occupant of the premises sought to be attached, or that the place where it was posted was a conspicuous place on the premises. There is no holding or intimation in the opinion that when a sheriff levies upon real property by leaving a notice in a conspicuous place thereon his return must show the particular place where he left the copy of the writ, or that it would not be sufficient in such a return for him to certify that he left it in a conspicuous place.

8. Again, it is claimed that the return under consideration is insufficient because it does not state that the ⁵³³ land attached was the property of the defendants in the writ. There is some apparent conflict in the authorities as to the effect of the omission of such a statement from an officer's return on a writ of attachment, and some of the earlier cases hold that it would be fatal to the attachment; but the decided weight of authority, as well as reason, seems to be that such a statement is not necessary to its validity, or to the jurisdiction of the court over the res, the presumption being that the officer obeyed the mandates of his writ, and, when he returned it with a certificate that in pursuance thereof he attached certain property, it is to be presumed that it belonged to the defendants in the writ, because he had no authority to attach the property of anyone else: *Drake on Attachment*, secs. 207, 208; *Waples on Attachment*, sec. 314.

9. The claim is also made that the return does not show that the premises were unoccupied at the time they were attached. The statute requires an attachment of real property to be made by leaving with the occupant, if there be one, a copy of the writ, and, if not, by leaving it in a conspicuous place thereon. The language of the return under consideration is that there was "no occupant thereof on the premises"

when the writ was served, and counsel argues that this is, in effect, a statement that the premises were actually occupied, but the occupant was temporarily absent at the time of the officer's visit. In view of the presumptions which always come to the aid of an imperfect or indefinite return of an officer, the construction of the return given by counsel is, in our opinion, untenable.

10. But, if it is sound, there is authority for holding that under the statute a valid attachment of real property may be made by leaving a copy of the writ in a conspicuous place thereon, if the officer, at the time of visiting ⁵³⁴ the land for the purpose of attaching it, cannot find anyone visibly occupying the same: *Davis v. Baker*, 72 Cal. 494.

11. Another objection to the sufficiency of the attachment is that the sheriff certifies that he made it by "posting" a copy of the writ in a conspicuous place on the premises, while the statute provides that real property shall be attached by "leaving" a copy of the writ in such a place. But, in our opinion, when an officer certifies that in the discharge of a duty requiring him to leave a copy of a writ or other paper he performed such duty by posting the writ or paper, it is but reasonable to conclude in a collateral proceeding that he left it so posted, and thus complied with the requirements of the statute: *Lewis v. Quinker*, 2 Met. (Ky.) 284, 287. In support of the position of counsel, we are cited to *Lewis v. Botkin*, 4 W. Va. 533, and to *Matteson v. Smith*, 37 Wis. 333; *Hall v. Graham*, 49 Wis. 553, and *Wilkinson v. Bayley*, 71 Wis. 131. These cases are not only direct attacks made in an appellate court upon the return of an officer, but they are based upon statutes entirely different from ours, and the decisions are expressly put upon the peculiar wordings of the statute. Thus, for example, in *Lewis v. Botkin*, 4 W. Va. 533, the statute requires the officer to "leave a copy posted at the front door of the place of abode of the defendant," and he returned that service was made by "posting an office copy hereof on the front door." On a motion to quash, the return was held insufficient because it must be presumed that the legislature meant something more than mere posting by requiring the copy to be left posted, and that, in view of this provision of the statute, it could be true that the officer posted the copy, and yet not be true that he left it posted; but the court did not hold that, in the absence of such a statutory requirement, ⁵³⁵ a court might not reasonably conclude from the certificate of an officer that he posted a notice at a certain

place that he left it so posted. The Wisconsin cases are based upon either a rule of court having the force and effect of a statute, or of a statute requiring proof of service to show that a copy of the summons was left with the defendant, as well as delivered to him; and therefore it was held on appeal that a return which did not so state was insufficient.

12. It is next claimed that the orders for publication of the summons in the actions brought against the Richardsons are void, because: 1. The affidavits upon which they are based did not tend to show that any diligence had been used to find the defendants in this state, or that they, or either of them, had property therein; 2. No legal proof was made that the defendants could not be served in Multnomah county; and 3. The orders for publication do not direct that a copy of the summons and complaint be deposited in the postoffice, as required by section 57 of Hill's Annotated Laws, "forthwith." The affidavits for publication, after reciting the facts constituting plaintiff's cause of action, allege the commencement of the actions, the filing of the necessary affidavits and bonds for writs of attachment, the issuance thereof, and that "the same was, on the twenty-second day of April, 1894, duly executed by levying upon, and the attachment of, certain real estate of the defendants in Benton county, Oregon; that said attachment has not been dissolved or discharged; that the defendants are, and each of them is, a nonresident of the state of Oregon, and are, and each of them is, a resident of the state of Washington; and they are now, and each of them now is, without the state of Oregon, and cannot be found within said state, even after diligent search; and affiant therefore avers that personal service of summons cannot be ⁵³⁶ made upon defendants, or either of them, within the state of Oregon." Under the ruling in *Pike v. Kennedy*, 15 Or. 420, these averments are sufficient to sustain the order for publication on a collateral attack. In the case referred to, the affidavit stated that the defendants, to secure the payment of a promissory note, executed a mortgage on certain real property in the city of Portland, Multnomah county, Oregon, and this was held a sufficient allegation that they did have property within the state. In the case at bar, the statement is that certain real property of the defendants in Benton county, Oregon, had been theretofore attached, and this is obviously a more positive showing that defendants have property in the state than the one held good in *Pike v. Kennedy*, 15 Or. 420.

13. So, also, in the latter case, it was averred that personal service could not be made upon the defendants in this state, for the reason that they had departed therefrom, "and now reside at Walla Walla, in the territory of Washington," which was not absolutely inconsistent with their actually being within the state at the time; while in the affidavits under consideration the statement is that the defendants not only reside in the state of Washington, but there is a positive statement that at the time of making the affidavits they were not within the state of Oregon, and in this regard the showing is also more positive than the affidavit in *Pike v. Kennedy*, 15 Or. 420.

14. Again, it is claimed that a valid order for service by publication can be made only after a summons has been placed in the hands of the sheriff, and returned, "Not found." But we find no such provision in the statute. It provides (section 56) that when service of the summons cannot be made as prescribed in the last preceding section, "and the defendant, after due diligence, cannot be found within the state, and when that ⁵³⁷ fact appears by affidavit to the satisfaction of the court or judge thereof, . . . and it also appears that a cause of action exists against the defendant, or that he is a proper party to an action relating to real property in this state, the court or judge . . . shall grant an order that the service be made by publication of a summons" in certain designated cases. This section provides when service may be made by publication, and how the necessary jurisdictional facts for an order to that effect shall be made to appear. It does not provide that before making the order it shall appear from the return of the sheriff that the defendant cannot be found, but that it shall so appear by affidavit to the satisfaction of the court or judge thereof; and, when the requisite facts thus appear, the court has jurisdiction to make the order: *Goodale v. Coffee*, 24 Or. 346, 354. The method of service by publication is statutory, and it is sufficient when the requirements of the statute, whatever they are, have been complied with. It is claimed by counsel, however, that the only legal evidence of the fact that service of the summons cannot be made as provided "in the last preceding section" is a return of the sheriff to that effect. In support of this contention he cites section 59 of *Hill's Annotated Laws*, which provides: "Whenever it shall appear by the return of the sheriff, his deputy, or the person appointed to serve the summons, that the defendant is not found, the plaintiff may deliver another summons to be served, and so on until service

be had; or the plaintiff may proceed by publication as in this title provided, at his election." But, as we view it, this section has no bearing whatever on the question under consideration. It simply gives to the plaintiff the right to issue an alias summons, or proceed by publication, as he may elect, whenever it appears by the return of the sheriff or deputy that the defendant is ⁵³⁸ not found; but it does not undertake to provide what the method of procedure shall be in case the plaintiff elects to proceed by publication. That is elsewhere provided in the statute.

15. The next objection is that, although the order for publication of the summons directs that a copy of the complaint and summons be deposited in the postoffice, addressed to the defendants at their place of residence, it does not order such deposit to be made "forthwith," as the statute (section 57) requires. The omission of the word "forthwith" from such an order, although required by the statute, is not regarded, on collateral attack, as fatal to the proceedings, when it appears that the copies were in fact mailed within a reasonable time after the date of the order: *Lyon v. Comstock*, 9 Iowa, 306; *Anderson v. Goff*, 72 Cal. 65, 1 Am. St. Rep. 34.

16. It is claimed, however, that the deposit in this case was not so made. The order for publication is dated July 13th, and the publication was had in the first issue thereafter of the newspaper in which it was directed to be made—on the 20th—and copies of the complaint and summons mailed to the defendants on the same day; and, in our opinion, this was a substantial compliance with the requirements of the statute, and was not such a delay as to oust the court of the jurisdiction otherwise rightfully obtained. The object to be accomplished by such a deposit in the postoffice, where the residence of the defendant is known, is to give him such notice, in connection with the publication itself, as will inform him that the suit is pending, so that he may have an opportunity to appear and defend, if he so desires; and this purpose is served, it seems to us, when the deposit is made in the postoffice as early as the first ⁵³⁹ publication, if such publication itself is made within a reasonable time after the date of the order.

17. It is also claimed that the proof of publication and of the mailing is insufficient to sustain the judgment because: 1. Such proof is not attached to or indorsed on the original summons; 2. The deposit in the postoffice was not made by the sheriff or his deputy, or by a person specially appointed by him

or the court, but by an unofficial person; and the affidavit in proof of such deposit does not show that a copy of the summons required to be published was deposited, or that such copy was certified to. But these objections are each without merit. There is no principle of law rendering a judgment invalid on collateral attack simply because the proof of service of the summons is not annexed to or indorsed on the summons itself.

18. Nor are we advised of any provision of the statute which requires the proof of a deposit of the complaint and summons in the postoffice, in pursuance of an order for service by publication to be made by the sheriff or his deputy, or a person specially appointed for that purpose, or that the copy of the summons so deposited should be certified to by anyone. Section 54 of the statute designates the person by whom service of the summons shall be made when the defendant is found in the state, but it has no reference, as we interpret it, to the method of service by publication. In the latter case, the law requires a copy of the complaint and summons to be deposited in the postoffice, directed to the defendant, if his residence is known to the party making the application, or can with reasonable diligence be ascertained (section 57); but there is no provision that such deposit shall be made by any particular officer or person, and, in our opinion, it is sufficient if made by any adult ⁵⁴⁰ person competent to make the required proof thereof, except, probably, the party himself.

19. It is also insisted that the judgment is void because the original summons does not appear in the judgment-roll. But there is likewise no merit in this objection. The proof of publication, as well as the findings and recitals in the judgment of the court, shows that such a summons was, in fact, issued, and its omission from the judgment-roll is, therefore, of no consequence at this time.

20. And, finally, it is contended that the judgments upon which this suit was brought are void because the attached property had been transferred by the Richardsons to their co-defendants before the commencement of the several actions at law, and hence it is claimed that they had no interest therein which could be seized on attachment, and so the court did not obtain jurisdiction to render any judgment whatever. A sufficient answer to this position is that the complaint in this suit avers that such transfer was made for the purpose of defrauding creditors, and as to the plaintiff it is, therefore, only an apparent, and not a real, transfer. As to it, the land still be-

longed to the fraudulent grantor, and was as much subject to attachment as though the fraudulent deed had never been made: *Waples on Attachment*, sec. 249; *Mulock v. Wilson*, 19 Colo. 296; *Keene v. Sallenbach*, 15 Neb. 200; *Williams v. Michenor*, 11 N. J. Eq. 520; *Greenway v. Thomas*, 14 Ill. 271; *Dewey v. Eckert*, 62 Ill. 218.

Having thus disposed of the numerous objections to the validity of the judgments upon which this suit is based, the only remaining question is one of fact to be determined from the testimony. The court below found that the conveyance from the Richardsons to their minor children was fraudulent and void as to the plaintiff, and ⁵⁴¹ this conclusion is, in our opinion, fully supported by the testimony. It is unnecessary to state the facts disclosed by the evidence in detail. It is sufficient that at and prior to the time of the conveyance in question the defendants Richardson were indebted to the plaintiff in the aggregate sum of more than eight thousand dollars, and to other parties in large sums, and were wholly insolvent; that before the date of the conveyance they were called upon by plaintiff to either pay or secure the indebtedness due it, and several conferences had been had between them and the officers of the bank in regard to the matter, during which the question of securing the indebtedness by a mortgage on the Oregon land was considered. While these negotiations were in progress, and while the bank was relying upon their honesty and good faith, they secretly conveyed their personal property in Washington to one of their hired men, a part of the stated consideration being wages alleged to be due him, took his note for the balance, and transferred it to one of their creditors; and also conveyed the Oregon land to their three minor children, the eldest of whom was at the time eighteen years of age, and the youngest ten, for the evident purpose, as we read the testimony, of preventing its seizure by their creditors.

It is true the answer alleges, and the defendants A. C. and Laura R. Richardson undertook to claim, that the conveyance was made to their children in payment and satisfaction of a debt due them. The evidence which they offer in support of this defense is that in 1881 they received from the grandmother of the children three hogs of uncertain pedigree, but of the alleged value of five hundred dollars, in trust under an agreement to care for them, and to account to the children for their increase, and the product thereof, whenever the grand-

mother should call upon them to do so; that at or about the time of the ⁵⁴² conveyance in question they were called upon to render an account of their trust, and upon such accounting it was found they were indebted to their children in the sum of ten thousand four hundred and fifteen dollars and sixty-six cents, and, upon demand of the grandmother, the conveyance was made in payment thereof. When it is remembered that this conveyance was made at a time when the defendants were insolvent, were being pressed by their creditors, and that the evidence discloses that the property received from the children's grandmother, if any, was used, managed, controlled, handled, and disposed of by the Richardsons at their pleasure; that no account whatever was kept in reference thereto, and no witness in the case has been able to give even approximately the several items going to make up the aggregate sum of ten thousand dollars; and the further fact that one of the grantees in the conveyance was not born until after the creation of such alleged trust—it will be apparent that this defense, and the evidence in support of it, do not appeal very strongly to a court of equity.

21. The conveyance, and the circumstances under which it was made, bear the semblance of an attempt to cover up the property, and it was, therefore, the defendant's duty to show that it was made in good faith, and for a valuable consideration. Under such circumstances, the defendants ought to be able to point out definitely the various items going to make up the alleged indebtedness. As said by Mr. Justice Thayer in *Marks v. Crow*, 14 Or. 382: "Any other rule, where property has been shifted from one member of a family to another, and creditors left unprovided for, would lead to the most flagrant frauds. The creditors could not show that the indebtedness claimed to be the consideration of the transfer did not exist. They could do no more than to inquire when and under what circumstances it was created; and, unless the recipient of the property ⁵⁴³ could give a clear and precise account of the items constituting it, they should have the right to ask the court to infer that it was a sham and pretense; otherwise property might be put beyond the reach of creditors with impunity." Fraudulent intent is a question of fact, but it is agreed that it may be inferred from the facts and circumstances surrounding the transaction. It sometimes—and often, indeed—happens that the surrounding circumstances quite as satisfactorily explain the true inwardness of the transaction, and import knowledge of its

object or of the intended fraud, as any other character of testimony. It follows that the decree of the court below must be affirmed, and it is so ordered.

COLLATERAL ATTACK ON JUDGMENTS.—A judgment of a court having jurisdiction of the parties and of the subject matter cannot be impeached collaterally, on the ground of error or irregularity: *Hall v. Sauntry*, 72 Minn. 420, 71 Am. St. Rep. 497; note to *Johnston v. San Francisco Sav. Union*, 7 Am. St. Rep. 137; *Knott v. Taylor*, 99 N. C. 511, 6 Am. St. Rep. 547. Such an attack on a judgment or order cannot be successful unless the judgment or order is void: *Dyer v. Leach*, 91 Cal. 191, 25 Am. St. Rep. 171; *Kingman v. Paulson*, 126 Ind. 507, 22 Am. St. Rep. 611; and it is not void unless the thing lacking or making it so is apparent in the record: *Kingman v. Paulson*, 126 Ind. 507, 22 Am. St. Rep. 611. A judgment of a court of competent jurisdiction cannot be collaterally impeached, unless the record shows, affirmatively, a want of jurisdiction: *Notes to Brown v. Wilson*, 52 Am. St. Rep. 239; *Hardy v. Beaty*, 31 Am. St. Rep. 87.

ATTACHMENT AGAINST NONRESIDENTS—JUDGMENT.—If a party is a nonresident, a judgment against him is effectual only as a judgment in rem, acting upon such property as he may have within the jurisdiction: *Notes to Alley v. Caspari*, 6 Am. St. Rep. 182; *Morrill v. Morrill*, 23 Am. St. Rep. 115. Service of process by publication enables the court to give effect to a proceeding, so far only as it is one in rem: *Wilson v. St. Louis etc. Ry. Co.*, 108 Mo. 588, 32 Am. St. Rep. 624. The court, in such a case, has jurisdiction to enforce a pecuniary penalty for the satisfaction of which property has been attached: *Note to Morrill v. Morrill*, 23 Am. St. Rep. 115. If property is attached, and the defendant is served by publication only, the court has jurisdiction to render a judgment personal in form, but affecting only the property attached: *Neufelder v. German etc. Ins. Co.*, 6 Wash. 386, 36 Am. St. Rep. 166. See note to *Hartzell v. Vigen*, 66 Am. St. Rep. 601. The jurisdiction over a nonresident on service by publication results from the fact that he has property within the jurisdiction, and extends only to such property as was within the state when the jurisdiction attached: *Stone v. Myers*, 9 Minn. 303, 86 Am. Dec. 104.

ATTACHMENT AGAINST NONRESIDENTS—PROCESS—COLLATERAL ATTACK.—Judgments rendered upon constructive service by publication are given the same conclusive effect and are entitled to the same favorable presumptions as judgments upon personal service. If the court has jurisdiction, its judgment cannot be impeached collaterally: *Hardy v. Beaty*, 84 Tex. 562, 31 Am. St. Rep. 80; *Cruzen v. Stephens*, 123 Mo. 337, 45 Am. St. Rep. 549; and see the monographic note to *Morrill v. Morrill*, 23 Am. St. Rep. 104, treating of collateral attacks upon judgments. In such a case, the judgment is not subject to collateral attack for any errors committed by the court in the course of the proceedings: *Taylor v. Coots*, 32 Neb. 30, 29 Am. St. Rep. 426. It cannot be collaterally attacked for defects in the affidavit for the publication of summons, or even its falsity: *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422; or on the ground that such affidavit is insufficient: *Hardy v. Beaty*, 84 Tex. 562, 31 Am. St. Rep. 80. A collateral attack on an attachment can never be sustained for causes which do not render the writ absolutely void, and not merely voidable: *Mudge v. Steinhart*, 78 Cal. 84, 12 Am. St. Rep. 17.

ATTACHMENT AGAINST NONRESIDENTS—ORDER FOR PUBLICATION—SUMMONS—AFFIDAVIT.—An order for publication of summons must be based on an affidavit by the plaintiff showing affirmatively an existing cause of action against the defendant; otherwise the court will not acquire jurisdiction of the defendant. The affidavit should show that the defendant is a non-resident of, and cannot be found within, the state, and that due diligence to find him has been exercised: *Note to Taylor v. Coots*, 29 Am. St. Rep. 483. The filing of the affidavit is a prerequisite condition to an authorized publication: *Barber v. Morris*, 37 Minn. 194, 5 Am. St. Rep. 836. An order for the publication of the summons must follow the issuance of the summons and not precede it: *Coffin v. Bell*, 22 Nev. 160, 58 Am. St. Rep. 738. An affidavit for the publication of summons that the defendant is a nonresident of, and absent from, the state, and cannot be served with summons therein, is sufficient to authorize service by publication: *Taylor v. Coots*, 32 Neb. 30, 29 Am. St. Rep. 426; *note to Williams v. Wescott*, 14 Am. St. Rep. 296; *Anderson v. Goff*, 72 Cal. 65, 1 Am. St. Rep. 34. It is not necessary for the affidavit for service of summons by publication upon a nonresident to show that a writ of attachment has issued, or that the defendant has property in the state: *Anderson v. Goff*, 72 Cal. 65, 1 Am. St. Rep. 34. *Contra*, see *note to Williams v. Wescott*, 14 Am. St. Rep. 296. Nor need the affidavit for attachment against a nonresident state that he has property in the state subject to attachment: *Note to Mudge v. Steinhart*, 12 Am. St. Rep. 22. But, while it is not necessary to state this fact either in the affidavit for the publication of summons or in the affidavit for attachment, the fact remains that there is nothing to support jurisdiction unless property of the defendant is attached: See the principal case. It is held in *Hartzell v. Vigen*, 6 N. Dak. 117, 66 Am. St. Rep. 589, that it is not necessary, to support a judgment based upon constructive service of process, that any attachment should have been levied before the publication of summons was made. It is sufficient that such levy preceded the entry of the judgment. An order for the publication of summons, directing a deposit of a copy of the summons in the postoffice, but omitting the word "forthwith" in such direction, is not void because of such omission, and will sustain a service, where such deposit was in fact made on the same day the order was signed: *Anderson v. Goff*, 72 Cal. 65, 1 Am. St. Rep. 34. Proof of service of summons may be made by anyone competent to be a witness, and who has knowledge of the fact. Such proof is sufficient on collateral attack: *Taylor v. Coots*, 32 Neb. 30, 29 Am. St. Rep. 426; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742. The summons must precede the issuance of the attachment: *Note to Langtry v. Wayne Circuit Judges*, 13 Am. St. Rep. 354; *White v. Johnson*, 27 Or. 282, 50 Am. St. Rep. 726.

ATTACHMENT—SUFFICIENCY OF RETURN.—If the return of a sheriff shows that he, in attaching realty, left a true copy of the attachment order, it will be presumed that he did his duty in serving the writ, and that the service was legally made, though the return does not show, in so many words, that he left a copy of the order with an occupant, or if there was no occupant, in a "conspicuous" place upon the land: *Note to Hall v. Stevenson*, 20 Am. St. Rep. 808.

FRAUDULENT CONVEYANCES—BURDEN OF PROOF.—To set aside a conveyance as fraudulent, it first devolves upon the attacking creditor to show a fraudulent intent; but when this is done, and the circumstances are suspicious, the purchaser must prove that he paid full value. When a fact is peculiarly within the knowledge of a party, he must produce the necessary evidence to prove it: *Note to Butler v. Thompson*, 72 Am. St. Rep. 847.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

ROACH v. KELLY.

[194 PENNSYLVANIA STATE, 24.]

NEGLIGENCE—PROXIMATE CAUSE.—A man is answerable for the consequences of a fault only so far as they are natural or proximate, or may on this account be foreseen by ordinary forecast, and not for those which arise from a conjunction of his fault with circumstances of an extraordinary nature.

NEGLIGENCE—PROXIMATE CAUSE.—If a saloon-keeper furnishes liquor to an intoxicated man, who quarrels with another man in the saloon, and then leaves and quarrels with a second man, afterward proceeding to a private lot, where he whips his second opponent and then engages in a fight with his first opponent, and upon the approach of the police runs away, slipping down a steep bank, falling into a sewer and breaking his neck, the furnishing of the liquor is so remote from the injury that it cannot be made the basis of a recovery.

C. Burleigh and W. A. Challener, for the appellant.

W. J. Brennen, for the appellee.

28 DEAN, J. Kelly, the defendant, was a licensed retail liquor dealer in the city of Pittsburg. On the afternoon of June 26, 1897, between 5 and 6 o'clock, one John Roach, a man about thirty-four years of age, a puddler by trade, entered Kelly's barroom; when there he took one or more drinks of whisky and at the time was visibly intoxicated; as to whether he was sober and as to how many drinks he took there was contradictory evidence, but the jury has found both facts against defendant, and we assume the findings to be correct. While in the barroom he met John Atkinson with whom some time before he had quarreled, and toward whom he bore ill-will.

The old quarrel was renewed; Kelly, fearing a disturbance, requested Roach to leave, which he did; he went out and stood on the pavement a very few minutes, then returned to the bar-room and talked for some minutes with several acquaintances, then went out again to the pavement, where he soon got into a war of words with one Pratt, the father in law of Atkinson; he soon left Pratt, and a short distance off met Butler, and told him, he, Roach, was going to have a fight; the two walked back to Pratt; then the three walked together along the street to the entrance of a tunnel under the Baltimore and Ohio Railroad; here they met George Wessel, and the four went through it to a vacant lot at the far end; on this lot was an open sewer excavation. Roach then took off his coat to fight Pratt, because of insulting epithets applied to him by Pratt when in front of the barroom; while fighting, Atkinson came on the ground and took part with his father in law, Pratt; then Butler took part with Roach, and fought against Atkinson; Roach defeated Pratt and then went to the help of Butler in his fight with Atkinson. By this time a noisy crowd had gathered; the police ran to quell the disturbance; it was shouted that the police were coming; the fighters and the crowd ran in different directions; three of them, one being Roach, attempted to scramble up and over the steep railroad bank; Roach tried to seize the legs of one of ²⁹ those before him to help him in climbing, missed his catch and fell back, tumbling down the steep bank into the opening for the sewer, breaking his neck in the fall. This was 7 o'clock, or from thirty minutes to an hour after he had taken his last drink of liquor at Kelly's. The facts, as thus narrated, were either found by the jury or are undisputed.

Roach's widow, this plaintiff, brought suit under the act of 1854 for damages occasioned by the death of her husband and got a verdict for five thousand dollars. The act reads thus: "Any person furnishing intoxicating drinks to any other person in violation of any existing law or of the provisions of this act shall be held civilly responsible for any injury to person or property in consequence of such furnishing, and anyone aggrieved may recover full damages against such person so furnishing by action on the case instituted in any court having jurisdiction of such form of action in this commonwealth." Then comes the seventeenth section of the act of 1887 as follows: "It shall not be lawful for any person, with or without license, to furnish by sale, gift, or otherwise to any person any

spirituous, vinous, malt, or brewed liquors on any day upon which elections are now or hereafter may be required to be held nor on Sunday, nor at any time to a minor or a person of known intemperate habits, or a person visibly affected by intoxicating drink."

If the violation of this statute by defendant was the proximate cause of the death of Roach it follows that Kelly is "civilly responsible" to the party aggrieved, Mrs. Roach.

At the trial defendant's counsel requested the court to charge that on the undisputed facts the verdict should be for defendant; but the learned judge was of the opinion that it was for the jury to determine whether the unlawful sale of liquor was the proximate cause of Roach's death. His legal conclusion is very clearly announced in this quotation from the charge: "In a case of this kind, the burden of proof is on the plaintiff, and it must be established to the satisfaction of the jury that the death resulted from the liquor obtained at the defendant's saloon; in other words, that that must be the direct or what in law is called the proximate cause of the death. If the death resulted from any other cause, any intervening cause, the selling of the liquor would not be the proximate cause; but there may have been several little incidents occurring or little things occurring ^{so} after the sale of the liquor, and if these are also the result of the sale of the liquor, they would simply be as links in the chain of causation and be related back to the original cause."

Of course, defendant had but small chance for a verdict under this instruction, nor from this and other parts of the charge do we suppose the learned judge intended he should have much, for he seems to have been of opinion that the proximate cause of the death was the unlawful sale of the liquor, and he might as well have plainly said so to the jury.

There are many cases where the question of remote or proximate cause is for the jury; but this is not one of them. The facts are undisputed; deceased had an old grudge against Atkinson; when heated by liquor he revived the old quarrel; in gratification of his ill-will he also picked a quarrel with Pratt, the father in law of the man he hated; they proceeded some distance to private property and fought; Roach defeated Pratt, then attacked Atkinson; while engaged in this second flagrant breach of the peace the cry of police is raised, and all, both the drunk and sober, fled; Roach, by the concurring circumstances of the slip on the bank and the fall into the open sewer, was

killed. Admit that his resentment on account of the old grudge and his quarrelsomeness were prompted by the liquor and resulted in the fight; he received no injury in that consequence of defendant's act; the direct effect of the liquor ended with the fight; in a subsequent attempt, however, to escape arrest for a violation of law he met his death; this was an intermediate cause, disconnected from the primary one, for which, under no view of the facts, was defendant responsible. If Roach in his flight had been arrested by the officers, and in a scuffle to escape from them had met his death, it might as well have been argued the proximate cause of his death was the unlawful sale of liquor, yet it is too plain for argument that the resistance to the officers was the proximate and effective intervening cause, while at most the sale of liquor was the very remote cause. If we apply the rule laid down in *Hoag v. Lake Shore etc. R. R. Co.*, 85 Pa. St. 293, 27 Am. Rep. 653, we reach the same conclusion. As is well said by Paxson, J., in that case: "A man's responsibility for his negligence and that of his servants must end somewhere. There is a possibility of carrying an admittedly correct principle too far. It may be extended so as to reach the *reductio ad absurdum*,³¹ so far as it applies to the practical affairs of life." And then quoting *Pennsylvania R. R. Co. v. Hope*, 80 Pa. St. 373, 21 Am. Rep. 100, he adopts as the safest rule, "that the injury must be the natural and probable consequence of the negligence—such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to follow from his act." It is said in *Morrison v. Davis*, 20 Pa. St. 171, 57 Am. Dec. 695: "The general rule is, that a man is answerable for the consequences of a fault only so far as the same are natural or proximate as may on this account be foreseen by ordinary forecast, and not for those which arise from a conjunction of his fault with other circumstances of an extraordinary nature. Thus, a blacksmith pricks a horse by careless shoeing; ordinary foresight might anticipate lameness and some days or weeks of unfitness for use, but it could not anticipate that by reason of the lameness the horse would be delayed in passing through a forest until a tree fell and killed him or injured his rider." The statute on which this suit is founded imposes no higher degree of responsibility on the liquor dealer than the common law imposes upon wrongdoers. It declares he "shall be held civilly responsible for any injury to person or property in consequence of such furnishing." The

criminal law imposes punishment without regard to the consequences; the civil law damages only for the natural and probable consequences of the act. It might be plausibly argued that defendant ought to have so far foreseen as the natural and probable consequences of his act, that Roach might have a deadly fall on the highway when going to his home, or that his death might result from being run down by cars while crossing a railroad track, or by falling into water and drowning, or possibly by exciting his quarrelsome disposition his death might have come from a blow inflicted by some insulted antagonist, but that he should quarrel with Pratt, proceed deliberately through a tunnel to a private lot on the opposite side of a railway, leisurely cast off his clothing, fight with Pratt and beat him, then engage with Atkinson, then, in terror of the law which he had violated, flee from the officers, slip down the steep bank he was striving to climb, fall into an open sewer hole negligently unguarded on a private lot, and thus break his neck, surely this was neither the natural nor probable consequence of giving him drink. The alleged cause ⁵³ is so remote from the injury that the learned judge ought to have said peremptorily that there could be no recovery.

The judgment is reversed and judgment is entered for defendant.

PROXIMATE CAUSE.—If an original wrong becomes injurious only in consequence of the intervention of a distinct wrongful act or omission by another, the injury must be imputed to the last wrong as the proximate cause: *Pickett v. Wilmington etc. R. R. Co.*, 117 N. C. 616, 53 Am. St. Rep. 611. Proximate cause is treated at length in the note to *Gilson v. Delaware etc. Canal Co.*, 86 Am. St. Rep. 807-861.

DEATH BY WRONGFUL ACT—SALOON-KEEPER'S LIABILITY FOR.—One who sells intoxicating liquor to a husband, who becomes intoxicated thereby, and in consequence of his abusive language is killed by a third party, is not liable in damages to the wife for the death: *Shugart v. Egan*, 83 Ill. 56, 25 Am. Rep. 359. See, further, the monographic notes to *Gilson v. Delaware etc. Canal Co.*, 86 Am. St. Rep. 830, 831; *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 669-687.

**LITTLE SAW MILL VALLEY TURNPIKE OR PLANK
ROAD COMPANY v. FEDERAL STREET & PLEASANT
VALLEY PASSENGER RAILWAY COMPANY.**

[194 PENNSYLVANIA STATE, 144.]

CORPORATIONS—POWER TO CONTRACT.—A street railroad company operating by horse power on the roadbed of a turnpike company has corporate power when it constructs an electric road to enter into a contract with the former company to compensate it for the increased burden placed upon its property.

CORPORATIONS—SEAL—PRESUMPTION.—If the common seal of a corporation is affixed to an instrument and the signatures of the proper officers are proved, it is presumed that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority.

W. P. Potter and W. A. Stone, for the appellant.

W. B. Rodgers, for the appellee.

¹⁴⁷ **BROWN, J.** The Federal Street & Pleasant Valley Passenger Railway Company, appellant, incorporated under the act of February 20, 1868, was occupying at the time of the execution of the contract sued upon a portion of the appellee's roadbed, with its tracks upon which cars were run by horse power. The agreement under which it had its tracks upon the turnpike or plank road seems to have been a verbal one, the terms of the same being immaterial in considering the questions raised on this appeal. In 1889 the appellant decided to change its motive power to electricity, and in making this change others became necessary. New and additional tracks were required, as well as overhead construction, for the operation of the road by the new power. These changes imposed new and additional burdens upon the appellee, entitling it to compensation, and there can be no question that the appellant had corporate power, implied if not express, to provide by agreement what should be paid to the turnpike or plank road company, instead of having the same adjusted by adverse and expensive proceedings at law.

An agreement in its name was executed by D. F. Henry, its president, providing, among other things, for the change to electricity ¹⁴⁸ as a motive power, and, in consideration of the change so allowed, guaranteeing to the Little Saw Mill Valley Turnpike or Plank Road Company, payment by the appellant each year after 1889 of any deficiency in the gross receipts

based upon those received in that year. The tolls diminished for the years 1893 to 1896, inclusive, six thousand four hundred and twenty-eight dollars and sixty-three cents, and this suit was brought for the recovery of that sum. On the trial, the plaintiff insisted that this deficiency in tolls was the measure of recovery fixed by the contract, but the court, fairly and liberally construing it, at least so far as the defendant was concerned, did not sustain this view. The jury were instructed that the amount recoverable was what they might find was the loss in tolls due to the substitution of electricity for horse and mule power in moving the cars. They were told to ascertain to the best of their ability under the evidence what amount, if any, of tolls had been lost by the defendant's use of electricity on its cars, and that if no loss had occurred by the use of it, the plaintiff could not recover. Their attention was called to what might have been other causes for the diminution of the receipts, and their verdict, in the light of the meager evidence to guide them, was in favor of the plaintiff for less than one-third of its claim. We cannot disturb it, if the instructions complained of were not improper.

The first complaint is, that the court erred in not holding that the contract was *ultra vires*, and that, therefore, the plaintiff could not recover. The court properly refused so to charge the jury, and the first assignment of error is overruled. It is insisted, however, that the railroad company was not bound by the contract, because it was made by the president without authority from the corporation or its board of directors. It is signed by the president. The corporate name attached was apparently in the handwriting of the secretary, and the common seal was affixed. Neither officer was called to deny authority to act, and the presumption was that it had been given. The maxim, *Omnia praesumuntur rite esse acta*, applies to acts done on behalf of corporations, and it can never be presumed that a corporate agent is acting wrongfully; or that an act which might have been a proper act to do on behalf of the corporation was done under circumstances rendering it improper: Taylor on Private Corporations, sec. 204. "Where ~~is~~ a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the con-

tract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them": *Merchants' Bank v. State Bank*, 10 Wall. 644. "When the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, the courts are to presume that the officers did not exceed their authority, and the seal itself is prima facie evidence that it was affixed by proper authority": *Angell and Ames on Corporations*, sec. 224. The second point submitted by defendant was properly refused. The second and third assignments of error are overruled and the judgment affirmed.

CORPORATIONS—IMPLIED POWERS.—In every express grant of power to a corporation there is implied a power to do whatever is necessary or reasonably appropriate to the exercise of the authority expressly conferred: *Northside Ry. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778, and note.

ULTRA VIRES CONTRACTS of private corporations are discussed in the note to *In re Assignment Mutual etc. Ins. Co.*, 70 Am. St. Rep. 156-180.

CORPORATE SEAL AS EVIDENCE.—The presence of the corporate seal on a contract purporting to be executed by a corporation is not evidence that the person who affixed it was authorized to do so, or that the contract is the contract of the corporation: *Morrison v. Wilder Gas Co.*, 91 Me. 492, 64 Am. St. Rep. 257. But see the note to this case, pages 262-265.

BEILSTEIN v. BEILSTEIN.

[194 PENNSYLVANIA STATE, 152.]

WILLS—GIFT OF INCOME.—A devise of the income of land is a gift of the land itself.

WILLS—DEVISE OVER—"FAMILY."—A devise over in case the devisee should die "without leaving a family" is an implied devise to the family of the devisee if she should leave one.

WILLS—"DIE WITHOUT LEAVING FAMILY"—MEANING OF.—A devise to a daughter of the income of land "as long as she lives, but should she die without leaving a family," then over, means death without issue or heirs of her body, and refers to an indefinite failure of issue creating a fee tail in the first taker, enlarged to a fee simple by statute.

A. H. Rowand and H. H. Rowand, for the appellants.

J. W. Kinnear, for the appellee.

¹⁵⁴ MITCHELL, J. The language of the will is "it is my desire that my daughter Gertie Beilstein shall receive the income of my property . . . as long as she lives, but, should she die without leaving a family," then over to testator's brothers and sisters, the appellants.

The gift of the income is the gift of the land itself: *Drusadow v. Wilde*, 63 Pa. St. 170; *Curry v. Patterson*, 183 Pa. St. 238. In the former case it is said by Sharswood, J.: "There is no construction of words older and better settled than that a grant or devise of the profits of land passes the land itself, 'for what,' says Lord Coke, 'is the land but the profits thereof, for thereby vesture, herbage, trees, mines and all whatever parcel of the land doth pass': Coke on Littleton, 4, 6."

The devise over in case Gertie should die "without leaving a family" is an implied devise to her family if she should leave one. It is only if she does not that the devise over is to take effect, and there is a necessary implication that in the other unexpressed contingency of her leaving a family the estate is to go to them. This is practically assumed without question ¹⁵⁵ in the long line of cases on the subject, which are carefully reviewed in *Seybert v. Hibbert*, 5 Pa. Sup. Ct. 537. The contest in all of them has been whether the devise over was upon a definite or an indefinite failure of issue.

The present case, therefore, turns on the meaning to be given to the word "family" in the testator's intent. "Family" is not a technical word, nor can it be given any technical meaning, irrespective of the context and scope in which the testator used it. It is conceded that it includes children, and the appellant's contention is that it means children only. But it is a broader word than children. In a very common, if not the most usual, sense, it includes all the persons of the same blood who are dwelling together in one household, and, in many cases, even the condition of the same blood is not requisite, and servants and others may be included, as, for instance, for the service of process. As already said, it is admitted that the testator by the word "family" meant to include children. If the devisee had been married and with children and grandchildren all dwelling with her as part of her household, when the testator wrote his will, there could be no doubt whatever that the testator, if he had then used the word "family," meant to include them all. But on what ground shall we assign it a narrower meaning when used with reference to the indefinite future? When he wrote his will

his daughter was a child of ten years, and he was providing for her in her unknown circumstances after his death. He foresaw that if she lived to grow up she might marry and have children, and he meant to provide for them as well as for her. Even the word "children" may be construed to include grandchildren, if it clearly appears that it was used with that intent: *Eichelberger's Estate*, 5 Pa. St. 264. Had the testator used the word "children," and his daughter had survived all her children and died leaving grandchildren only, it hardly admits of doubt that the true construction of his intent would have included them. But he used a more comprehensive word than "children," a word that would certainly have included grandchildren and remoter descendants if in existence then, and we see no reason to exclude them from his meaning, though children and grandchildren were then all alike only in posse. The natural scope of the word "family" in this connection is shown by Justice Bell's use of it in the opinion in *Eichelberger's Estate*, 5 Pa. St. 264.

¹⁵⁶ "It is plain that when preparing his will [the testator] had in his mind's eye all his family consisting of his immediate descendants then living."

We are, therefore, clearly of opinion that by the words "die without leaving a family" the testator meant die without issue or heirs of her body, and under all our cases this refers to an indefinite failure of issue, which creates a fee tail in the first taker, enlarged to a fee simple by the statute. Judgment, therefore, was properly entered for defendant.

Judgment affirmed.

A DEVISE OF THE RENTS, profits, and income of property is in effect a devise of the property itself: *Johnson v. Johnson*, 92 Tenn. 559, 36 Am. St. Rep. 104.

THE WORD "FAMILY," IN A WILL, under the English rule includes children alone, but in America the term has a broader application: See extended note to *Wade v. Jones*, 61 Am. Dec. 583, 589.

COGLAN v. FOREST OIL COMPANY.

[194 PENNSYLVANIA STATE, 224.]

SPECIFIC PERFORMANCE—IMPLIED COVENANTS—OIL LEASE.—A court of equity has no jurisdiction to specifically enforce implied covenants in an oil and gas lease, unless it appears that the lessee is fraudulently evading his obligations to the lessor.

LANDLORD AND TENANT—OIL LEASES.—There is no special relation of trust or confidence between the lessor and lessee in gas or oil leases any more than in any other. Like all other contracting parties, they deal at arm's length, each for his own interest, and so long as the question is one of business judgment and management, the lessee is not bound to work unprofitably for himself for the profit of the lessor, and the parties must be left to their own ways. It is only when a manifestly fraudulent use of opportunities and control is shown that courts are authorized to interfere.

LANDLORD AND TENANT—OIL LEASES—RIGHTS OF LESSEE.—If a lessee of oil or gas lands derives some collateral or incidental advantage from his leases of adjoining land, he is entitled to it just as a stranger would be. He may operate them jointly at less expense, or he may be helped in other ways by having both under one management. It is only when the wells on adjoining territory are being fraudulently used to drain the complainant's land that courts have any occasion to interfere.

LANDLORD AND TENANT—OIL LEASES—RIGHTS OF TENANT—VESTED RIGHTS—EQUITY JURISDICTION.—Lessees in an oil lease who have bound themselves by covenants to develop a tract, and have entered and produced oil, have a vested estate in the land which cannot be taken away on any mere difference of judgment, and the jurisdiction of equity to decree any specific act against the lessee or to declare a forfeiture depends on fraud averred and fully proved.

J. McF. Carpenter and R. W. Cummins, for the appellant.

J. K. P. Duff, for the appellee.

²³⁹ MITCHELL, J. This is a bill in equity by lessor against lessee for specific performance of covenants, or in the alternative for forfeiture of the lease and also for an account. As the covenants are merely implied, and their extent depends altogether on oral evidence of opinions, the case for relief is wholly wanting in that precision and certainty of contractual duty which is necessary to sustain the ordinary chancery decree for specific performance. The jurisdiction of equity in a similar case was, however, sustained in *Kleppner v. Lemon*, 176 Pa. St. 502, and we do not now propose to question it. But that decision was on the ground of fraud, the majority of the court being of opinion that the defendant was fraudulently evading his obligations to plaintiff while draining the oil from plaintiff's

land through wells on adjacent territory. "The findings show," says Williams, J., "that it is the expressed purpose of the defendant to secure Kleppner's oil through his wells on the Garlach and Stotler tracts of land." The basis necessary to sustain the bill, therefore, is fraud, and that, of course, must be affirmatively and clearly proved.

²⁴⁰ There is no relation of special trust or confidence between lessor and lessee in gas or oil leases, any more than in any other. Like all other contracting parties they deal at arm's length, each for his own interest. So long as the question is one of business judgment and management, the lessee is not bound to work unprofitably to himself for the profit of the lessor, and the parties must be left, as in other cases, to their own ways. It is only when a manifestly fraudulent use of opportunities and control is shown that courts are authorized to interfere.

The defendant contracted by its lease to put down one well on the plaintiff's land; it has in fact put down five. The bill charges, however, that the five were put down on the eastern half of the farm, to the neglect of the development of the western half, and, further, that although five wells were sunk on the eastern side, yet defendant was unduly draining that part of the land by wells on adjoining territory leased from other owners. As to this latter complaint the bill asked that such outside wells "be decreed to be wells taking and draining the oil from plaintiff's said land," and that an account and payment be ordered. The plaintiff's case, however, was so absolutely wanting in merit on this branch that the learned judge below not only granted no relief, but did not even discuss it in his conclusions of law. It would not be necessary, therefore, for us to consider this part of the case at all, were it not that the evidence throws a very strong light on the main question of good faith in the defendant's whole plan of operations for the development of the farm.

As already said, defendant's contract obligation was to sink one well. It has sunk five. One of these, known as Colgan No. 5, it was desirable in defendant's judgment to locate very near the line of another lessor, Caldwell. Defendant accordingly consulted both plaintiff and Caldwell, who both agreed to the location chosen, with the notice from defendant to plaintiff that, if it proved a paying well, defendant would, in justice to Caldwell, put down another on Caldwell's side of the line as an offset. This was done. The well on plaintiff's side of the

line proved a fair producer, though it declined after a few weeks, and the other well was then sunk on Caldwell's side and proved about an equal producer. This second well, known as Caldwell No. 4, is the chief subject of plaintiff's complaint and request²⁴¹ for an account. It is quite apparent, as the learned judge reports, that each of these wells draws its supply partly from the other's territory, but this was foreseen, and an express agreement made as to the location of the first one and the necessity for the second "as an offset." The plaintiff's bill, therefore, on this branch is conclusively met by his own agreement beforehand to the conduct he now complains of. In cases of this kind, arising from conflicting claims as to the territory from which the supply of any particular well is drawn, the rights and duties of the parties must be determined by their contracts. As between the parties, each lease must stand upon its own terms. The obligations, for example, of the defendant to the plaintiff depend on the lease from the latter to the former, and are not in any way increased or diminished by other leases from other parties. If the defendant derives some collateral or incidental advantages from its leases of adjoining territory, it is entitled to them just as a stranger would be. It may operate them jointly at less expense, or it may be helped in other ways by having both under one management. It is only when the wells on adjoining territory are being fraudulently used to drain the complainant's land that courts have any occasion to interfere. The practical test is to be found in the question, Are the outside wells, as, for example, the Caldwell, draining the Colgan wells to such an extent that if the former were operated by a third party, the defendant, as lessee of the latter, would find it good management to put down another well to save its own leased territory from exhaustion? If so, then good faith to its lessor would require it to put down the additional well that the lessor might get his proper royalty. But, if not, the latter has no cause of complaint. If plaintiff, as owner, would not find it profitable to put down a well to stop his neighbor's drainage of his land, the lessee cannot be held to any higher obligation. He is not bound to work at his own loss for his lessor's profit. In the present case, so far from establishing any fraud, the plaintiff has clearly shown the entire good faith of the defendant.

On the other branch of the case the court below found that the western half of the farm "would furnish at least one paying well," and decreed that a well should be put down by the appellant. There is, unfortunately, no evidence whatever to sup-

port ²⁴³ this finding. Not a single witness says so, and three experienced operators examined by defendant testify positively, as to their judgment that another well would not pay for its cost. All that the plaintiff showed was that there are several wells on the farms adjoining the west half, which are producing oil. How much was not shown, nor whether any one of them had paid for its cost. On the other hand, the defendant's witnesses testified that these wells were light producers, and while they, being down, can now be worked at a profit, yet they have not paid for their cost, and are a positive disproof of the wisdom of putting down another.

The extent of plaintiff's own testimony was that he thought he "could get plenty of other parties to take" the land, "but I will do it myself." This is very far short of what is required. So long as the lessee is acting in good faith, on business judgment, he is not bound to take any other party's, but may stand on his own. Every man who invests his money and labor in a business does it on the confidence he has in being able to conduct it in his own way. No court has any power to impose a different judgment on him, however erroneous it may deem his to be. Its right to interfere does not arise until it has been shown clearly that he is not acting in good faith on his business judgment, but fraudulently, with intent to obtain a dishonest advantage over the other party to the contract.

Nor is the lessee bound in case of difference of judgment to surrender his lease, even pro tanto, and allow the lessor to experiment. Lessees who have bound themselves by covenants to develop a tract, and have entered and produced oil, have a vested estate in the land which cannot be taken away on any mere difference of judgment. It is not within the jurisdiction of any court to oust the owner and forfeit the title to estates in that way, and the jurisdiction of equity to decree any specific act or declare forfeiture depends on fraud averred and fully proved. Experimental drilling of other wells on the western portion of this tract may work injury to defendant's wells already down, without any corresponding advantage to the plaintiff. The weight of the evidence is that such would be the probable result, but whether it would or not the defendant is not bound to submit to the experiment. It has an estate in the whole tract, has fully performed its agreement in relation ²⁴³ thereto, and not a single fact has been shown to authorize the court to interfere with its title or possession.

Decree reversed and bill directed to be dismissed with costs.

SPECIFIC PERFORMANCE OF LEASES is discussed in the extended note to *Wallace v. Scoggins*, 17 Am. St. Rep. 755-757. Any uncertainty in the terms of a lease will defeat its specific enforcement: See monographic note to *Atwood v. Cobb*, 26 Am. Dec. 669.

ON OIL LEASES and their construction, see *McKnight v. Manufacturers' Nat. Gas Co.*, 146 Pa. St. 185, 28 Am. St. Rep. 790; *Wetengel v. Gormley*, 160 Pa. St. 559, 40 Am. St. Rep. 733.

BRAUN v. BRAUN.

[194 PENNSYLVANIA STATE, 287.]

MARRIAGE AND DIVORCE—CRUELTY.—A divorce may be granted a wife upon evidence showing that the husband in his conduct toward her has been guilty of vile indecency, obscenity, dreadful profanity, coarse and brutal vulgarity, and that he added to this charges against the virtue of such wife, denying the paternity of his children, accusing her of adultery, compelling her to take dangerous drugs, and urging her to consent to a criminal operation to produce an abortion, and spreading his accusations broadcast without apparent cause, except an insane and unfounded jealousy.

MARRIAGE AND DIVORCE—PLEADING.—A libelant in a divorce case may join two or more distinct causes for divorce in the same bill. Thus, cruelty and adultery may be set up in the same libel for divorce.

J. D. Watson, L. McGuistion, W. A. Forquer, F. H. Murphy, and W. S. McElroy, for the appellant.

J. M. Thompson, J. M. Galbreath, H. L. Christie and W. C. Thompson, for the appellee.

²⁹¹ **GREEN, J.** This was a proceeding for divorce a vinculo by a wife against her husband in which the libel alleged cruel and barbarous treatment and also adultery. A jury trial was had and resulted in a general verdict in favor of the libelant. So far as the questions of fact are concerned, the verdict of the jury establishes the truth of both the charges. An examination of the testimony develops a great mass of evidence, far more than sufficient to justify the verdict on both charges. It seems almost incredible that any man fit to associate with his fellowmen could possibly be guilty of the vile indecency, the obscenity, the dreadful profanity, the coarse and brutal vulgarity with which this respondent constantly treated his wife. Added to this, his charges against the virtue of his wife, denying the paternity of ²⁹² his children, accusing her of adulterous intercourse with other men, compelling her to take dangerous drugs, and urging her to consent to a criminal

operation, all to produce an abortion, and spreading his accusations broadcast throughout the community, without any apparent cause except an insane and unfounded jealousy, make out a case of such cruel and barbarous treatment as is seldom heard in courts of justice. The language he constantly used to his wife is too filthy and vile to quote, but its citation is unnecessary in view of the verdict, which settles all controversy respecting it. There is really but one matter presented by the assignments of error that is worthy of the least consideration. The appellant claims that it was incompetent to set up two causes of divorce, cruelty and adultery, in the same libel, and therefore the libel should have been dismissed or the jury directed to find for the defendant. No decision of this court is cited to support this contention; in fact, the question does not appear to have ever been before us. In 2 Bishop on Marriage and Divorce, section 327, it is said: "If several matrimonial wrongs, as, for example, adultery and cruelty, are each made cause for the same kind of divorce, whether from bed and board or from the bonds of matrimony, the applicant for divorce may join all in one libel and take his decree for the one or more particular offenses which he proves. This is the universal practice in England and in our states." In *Young v. Young*, 4 Mass. 430, it was said: "The libel in this case charged upon the respondent extreme cruelty and also adultery, and prayed a divorce a vinculo, or such other decree relative to the premises as to the court should seem just and lawful." The bill was sustained. In *McDonald v. McDonald*, 1 Mich. N. P. 191, it was held that a bill alleging two grounds for divorce, adultery and habitual drunkenness, is not for that reason multifarious. In *Stokes v. Stokes*, 1 Mo. 320, it was ruled that different causes of divorce may be joined in the same bill. In *Morris v. Morris*, 20 Ala. 168, it was said: "But even if two distinct grounds for divorce are contained in the same bill it is not demurrable on that account." In *Quarles v. Quarles*, 19 Ala. 363, it was held that a bill for divorce a vinculo matrimonii which alleges cruelty, abandonment, and adultery on the part of the defendant is not multifarious. To the same effect are *Fritz v. Fritz*, 23 Ind. 388, and *Griffith v. Griffith*, 89 N. C. 293 113. In *Story's Equity Pleading*, section 257, it is said: "The title to the relief prayed is the same whether one or the other of the several alleged grounds be proved. It is well settled that the plaintiff may aver facts of a different nature which will equally support his application."

The case of *Johnson v. Johnson*, 6 Johns. Ch. 163, cited for appellant, in which it is held these charges may not be united in the same bill, is ruled upon the special provisions of the New York statute which is different from ours in the points indicated. Thus the chancellor said: "I feel well persuaded from a perusal of the statute which gives jurisdiction on this subject, that the prosecutions for adultery and for cruel usage were contemplated as totally distinct and separate prosecutions."

Thus, upon authority, it seems that the point is not well taken. Upon principle we do not see any sufficient reason for holding that the libellant in a divorce case may not join two or more distinct causes for divorce in the same bill; especially where the decree is the same in both—that is, either both a mensa or both a vinculo. In this case the decree for either cause would be a vinculo. It is contended that the proper decree in a case of adultery ought to contain a prohibition against subsequent marriage with the paramour. But there is nothing in our act which requires that the decree shall contain such prohibition. The act simply provides that in such a case there shall be no such marriage, but that prohibition takes place by force of the statute and does not require the help of a decree, although it is very proper to insert it therein. In this case it happens that the court below made the general decree which gave the parties liberty to marry again. It was competent for the libellant to complain of this and ask the court to correct it, but the respondent has no cause of complaint, and is not entitled to be heard on that subject.

Decree affirmed and appeal dismissed at the cost of the appellant.

DIVORCE—CRUELTY WITHOUT VIOLENCE.—There may be extreme cruelty without the slightest violence. Profane, obscene, and insulting language, or false charges of adultery, indulged by either spouse toward the other, may amount to cruelty within the meaning of divorce laws: See the monographic note to *Reinhard v. Reinhard*, 65 Am. St. Rep. 75, 80.

ESTATE OF MUSTIN.

[204 PENNSYLVANIA STATE, 437.]

WILLS—EQUITABLE CONVERSION.—If a testator by will masses his realty and personalty in a common fund, and directs that the balances remaining after payment, made of successive legacies of money, shall also be paid over, the will works a conversion of the realty complete at the death of the testator, and from that time the whole estate is assets for the payment of debts, freed, as to any part of it, from the operation of the statute relating to the lien of the decedent's debts.

B. Gilpin, for the appellant.

G. P. Rich and J. G. Johnson, for the appellee.

⁴³⁸ **ASHMAN, J.** On the question of the character of the estate in the hands of the accountants, as realty or personalty, depends the effectiveness of the order to pay and of the present petition to sell or mortgage. If the property is real estate, it is free by lapse of time from the lien of the debts set out in the petition, and it may not be sold or mortgaged at the instance of creditors. If it is personal estate, it is assets for the payment of debts of the decedent. That it has been hitherto treated as real estate by the parties and even by the court in the disposition made of the rents is not conclusive, because the question of conversion is now raised for the first time. The will must, therefore, be resorted to, and its provisions, we think, cannot be reconciled with the absence of an intent on the part of the testator to distribute his estate as money and not as land. It begins with a specific bequest of personal effects, followed by a legacy of ⁴³⁹ three thousand dollars, and it gives the residue of realty and personalty, in trust after life estate in the wife, to pay a legacy of ten thousand dollars, to set aside the sum of one hundred and twenty thousand dollars, and eventually to pay it in three separate amounts of forty thousand dollars absolutely, and in trust, if a balance should still remain, to pay additional pecuniary legacies aggregating eight thousand dollars. In case the estate should not then be exhausted, the trustee was directed to pay to a charity two thousand dollars, and to divide and pay over any final balance in three equal parts. Both at the time of the execution of his will and at the time of his death, the testator's personal property was inadequate to pay these gifts; but we concede that this fact was not conclusive, because his estimate of its value may have been an exaggerated one. We

read his intent in his testamentary language. He treats his real and personal estate as a blended fund, out of which legacies to the amount which he evidently thinks may exhaust the fund are to be paid. If any balance after their payment shall, however, remain, he directs the payment of additional bequests, and if there should still remain a balance, he provides a sum for a charity; and he finally directs that if these original and added gifts shall not have disposed of the residue, what may remain of his estate shall be paid over to three distributees. A man may, it is admitted, make a good devise of real estate by a simple direction to pay it over; but when he masses his realty and personalty in a common fund, and directs that the balances which may remain after payment made of successive gifts of money shall also be paid over, the inference is almost irresistible that the final payment is to be of the same character as those which preceded it. In *Marshall's Estate*, 147 Pa. St. 77, a conversion was implied from a residuary gift of real and personal estate to executors as trustees for children, and where the interest of a child dying without issue was to be distributed among the survivors or the heirs of deceased children. Our conclusion is, that the will worked a conversion; that the conversion was complete at the death of the testator; and that from that moment the whole fund was assets for the payment of debts, and freed as to any part of it from the operation of the act relating to the lien of decedent's debts: *McWilliam's Appeal*, 117 Pa. St. 111.

The prayer of the petition is granted; counsel will draw the decree.

WILLS.—AN EQUITABLE CONVERSION is worked where there is such a blending of real and personal estate by the testator in his will as clearly to show that he intended to create a fund out of both and bequeath it as money: See monographic note to *Ford v. Ford*, 5 Am. St. Rep. 143.

DREIFUS v. COLUMBIAN EXPOSITION SALVAGE CO.

[191 PENNSYLVANIA STATE, 475.]

CONTRACTS—CANCELLATION—CONSIDERATION FOR NEW CONTRACT.—The mutual, unexecuted undertakings of an existing contract are a sufficient consideration for the cancellation of such contract and the substitution of a new one with different terms, and it is immaterial if, for a moment during the interval, there is technically a breach of the old agreement, since by the new agreement both parties treat the old one as an existing contract, and mutually agree to a rescission of it.

CONTRACTS—CANCELLATION—CONSIDERATION FOR NEW CONTRACT.—If, upon the breach of a contract to deliver merchandise by one party, the other party agrees to accept a fixed quantity and quality of merchandise, at certain times and prices, different from those mentioned in the original contract, this works a cancellation of the old contract, and is a sufficient consideration for the new one.

T. Leaming, for the appellant.

A. Israel, J. Singer, and E. Furth, for the appellees.

⁴⁸⁴ **DEAN, J.** This suit was begun by foreign attachment, and at the hearing the issue took the form of an action of assumpsit. The cause was sent for trial to E. Hunn Hanson, Esq., as referee, to find facts and apply to them his conclusions of law; in effect, both his findings and conclusions are in favor of plaintiffs, and defendant appeals, alleging he erred in not finding for defendant and certifying a balance in its favor. The findings of fact are so full and so orderly stated by the learned referee that it would be a useless labor to restate them at length in this opinion. Counsel for appellant accepts as true all the material facts of the referee approved by the court below, but he assigns for error the referee's conclusions from them.

Briefly stated, defendant, in February, 1895, contracted to deliver f. o. b. cars at Chicago, for shipment to Pittsburg, three thousand tons of sheared steel at seven dollars and fifty cents per ton, the deliveries to be completed by June 30th following, to be paid for in plaintiff's thirty day drafts when delivered. At the expiration of the time, neither party had performed to the letter the contract; shipments continued during the summer, but defendant, alleging a breakdown of its machinery for shearing the steel, made no shipments after the 7th of August, and on the 10th of that month notified plaintiffs that it was impossible to ship sheared steel as provided by the

contract. By this time the steel had largely advanced in price over the contract figure—had very nearly doubled. It is not improbable, as plaintiffs allege, that defendant sought to evade its contract obligation; and it is too plain for argument that plaintiffs wanted the steel and did not want a suit against defendant for damages; so, on September 11th, L. E. Block, a member of the plaintiff partnership, met Levine, president of defendant company in Chicago; much anger was displayed by both, and suits were threatened, but the interview ended in the making of a new contract, by which the old one was canceled, and the new one, materially modifying and changing the terms of the old, was agreed upon. The terms of the new one are expressly set out in the two letters of the 12th and 13th of September, one and two days after the interview between Block and Levine. These are the letters:

495 "Chicago, September 12th, 1895.

"Messrs. Dreifus, Block & Co., Pittsburg, Pa.

"Gentlemen: In accordance with agreement between the writer and your Mr. L. E. Block, the various contracts between you and this company are canceled and you agree to accept in lieu thereof 200 tons of steel scrap 6 feet and under and 900 tons of steel in shape as we bring them to our shears. In all other respects such as to price, delivery, terms of payment, and return of expense bills, etc., the same provisions shall apply as in the contracts which are canceled. Please acknowledge receipt and oblige,

"THE COLUMBIAN EXPOSITION SALVAGE CO.,

"Per A. LEVINE,

"President."

"Pittsburg, Pa., September 13, 1895.

"The Columbian Exposition Co., Chicago, Ill.

"Gentlemen: Replying to your favor of the 12th same is satisfactory to us. Please have all of this material shipped without further delay.

"Yours respectfully,

"DREIFUS, BLOCK & CO."

Shipments continued under this new contract for months when plaintiffs seized by foreign attachment one hundred and four tons of steel shipped by defendant to Pittsburg, and refused payment of the drafts therefor; then this suit was commenced in Philadelphia by plaintiffs to recover damages for the

breach of the old contract. The referee finds thus: "The letters of September 12th and 13th exhibit in the clearest way that it was the expressed purpose of the parties to end their rights under the contract of February 8th, 9th, and 12th, and in place of them to substitute the September agreement."

But on this established fact, the referee concludes thus: "There was no valuable consideration for the agreement. Since the plaintiffs invoke the strict legal principle, it is decided that after the breach of the February contracts there could be neither the substitution of another, nor its cancellation, neither its release nor discharge without a valuable consideration for it."

Hence his finding for the plaintiffs. He states the general rule of law correctly, when he says: ⁴⁹⁶ "It is true that even after a breach of contract, a debtor, by paying to his creditor but a part of his debt, may have a valid discharge of all, if there was doubt as to the amount due, or if that which was due is unliquidated, but not otherwise. . . . In this case the debt was capable of exact ascertainment by calculation . . . and that which was due was not unliquidated."

The opinion of a lawyer, of the learning and ability of the referee, has moved us to a careful revision and consideration of his report; after the most mature deliberation, we are clearly of the opinion he erred in his application of the law to the facts found by him. Assume, as he does, that at the personal interview between Block and Levine on the 11th of September, there was a distinct declaration by the latter that his company would not perform its contract; still if anything can be clear, it is, that above all things plaintiffs did not want a lawsuit for damages; at that stage, their damages were wholly uncertain, depending on the fluctuating price of steel; they did know they wanted the steel; what damages they might want by reason of defendant's breach, or what they might sustain, they did not know. In this dilemma, they sought for and obtained a new contract expressly canceling the old. They did not accept a less sum than the money due on a debt certain in amount, a contract which under the authorities would have been without consideration; they agreed to accept a fixed quantity and quality of merchandise at fixed times and prices, instead of the uncertain event of a lawsuit. It in no way changes the character of the contract of September 11, 1895, that, now, long after the event, the referee can under the terms of the old contract, to his satisfaction, with approximate certainty, liquidate the

damages occasioned by the breach. How did matters stand, then, with the uncertainty of the steel market on that day? That was the question in contemplation of both parties. In *McNish v. Reynolds*, 95 Pa. St. 483, we held, "that the mutual, unexecuted undertakings of an existing contract are a sufficient consideration for the cancellation of such a contract, and the substitution of a new one with different terms." It is immaterial if, for a moment during the interview, there was technically a breach by defendant; by the new agreement both treated the old one as an existing contract, and mutually agreed to a rescission of it.

⁴⁸⁷ And even taking the most rigid statement of the rule invoked by the referee, that rule reaches no further than stated by Sharswood, C. J., in *Bank v. Huston*, 11 Week. Not. Cas. 389: "It may be considered now well settled in this state that payment of a part of an undisputed debt after it is due, though accepted in full, is not a good accord and satisfaction. While this is so, it is equally well settled that the acceptance of a collateral thing, without regard to its value, is a good accord and satisfaction. In the absence of fraud, the courts never inquire into the adequacy of the consideration of an agreement."

Assuming that the damages could have been liquidated with certainty at that date, plaintiffs condoned all the wrong defendant threatened, and accepted as full satisfaction, certain merchandise, a collateral thing, steel of a different size, unsheared scrap, at a different price, instead of insisting on payment in money of the sum certain. In *Flegal v. Hoover*, 156 Pa. St. 276, involving a contract which in all its material features resembles the one before us, our Brother Mitchell, speaking for the court, says: "The parties then came together, agreed upon a settlement, put its terms in writing, which was signed by both, and partly carried out. Such an agreement is not an accord, but a compromise, and is as binding as any other contract. But it was not necessary to the validity of the agreement of May, 1892, that there should have been even a compromise of disputed rights. The parties to a contract may at any time rescind it, either in whole or in part, by mutual consent, and the surrender of their mutual rights is sufficient consideration. That is what the parties did in the present case, and their rights must be determined exclusively by the agreement of May, 1892. . . . The parties have made a final adjustment of all these matters, and the original contract of

1891 is of no further efficacy except as a guide in determining how much was due under it for the logs and bark mentioned in the agreement of 1892."

The learned referee holds that this contract must be determined by the *lex loci*, the law of Illinois, but there is no substantial conflict between the law of that state and this, as will be seen by reference to *Martin v. White*, 40 Ill. App. 281, and *Bishop v. Busse*, 69 Ill. 403. In *Insurance Co. v. Detwiler*, 23 Ill. App. 656, the court says: ⁴⁸⁸ "The term 'cancellation' of a contract necessarily implies a waiver of all rights thereunder by the parties. If, after breach by one of the parties, they agreed to 'cancel' it and make a new contract with reference to its subject matter, that is a waiver of any cause of action growing out of the original breach, and this is the rule even though the original contract was under seal."

As to the attachment proceedings on the one hundred and four tons of iron in Pittsburg, delivered on the second contract, we think, as the court there had jurisdiction before suit was entered here on the old contract for damages, it is best that that court should retain jurisdiction in that matter until final judgment. It would not be conducive to orderly litigation to import that question into this issue.

But, for the reasons given, the judgment of the court below in this case is reversed, and judgment is entered for defendant.

CONTRACTS—RESCISSION—CONSIDERATION.—Where a contract is executory and before breach thereof, it may be rescinded by the mutual agreement of the parties; and so far as it remains executory, an agreement to annul on one side is consideration for such an agreement upon the other side: *Note to McCreery v. Day*, 16 Am. St. Rep. 799. But a new consideration is essential to support an agreement to substitute one contract in place of another: *Spann v. Baltzell*, 1 Fla. 301, 46 Am. Dec. 346; or to support a parol rescission of a written contract: See extended note to *Bryant v. Isburgh*, 74 Am. Dec. 658.

WILEY v. McGRATH.

[194 PENNSYLVANIA STATE, 496.]

REPLEVIN.—PUNITIVE DAMAGES in replevin may be allowed in all cases where there has been peculiar circumstances of outrage, oppression, and wrong in the taking or detention of the property.

REPLEVIN—EVIDENCE.—In replevin, a married woman claiming the contents of a livery stable sold to her by her husband under a bill of sale may, in addition to such bill of sale, offer in evidence the lease of the stable and an assignment to her by her husband of a policy of insurance on the property as cumulative evidence of the exclusive, open, and notorious character of her tenancy and possession.

REPLEVIN—PLEADING.—The defendant in replevin cannot disclaim property in himself by plea, and then attempt to prove property in himself when he has filed no plea making that an issue.

A. Simpson, Jr., and F. J. Lambert, for the appellant.

T. A. Fahy, for the appellee.

⁴⁹⁶ **DEAN, J.** Joseph Wiley, the husband of plaintiff, kept a livery stable ⁵⁰⁰ on Sydenham street in Philadelphia. On July 27, 1894, by regular bill of sale, he transferred to his wife, Elizabeth Wiley, four horses, some harness, two carriages and one coupé, kept at the stable. While the consideration expressed is "one dollar and other good consideration," it is not disputed that she paid a full price for the articles. The wife took possession of the property, and undertook to carry on the stable; she gave notice generally of her purchase, and within a few days, having occasion to call upon Frank McGrath, who conducted a stable on Seventeenth street, she exhibited to him the bill of sale, also showed it to young Frank C. McGrath, this defendant, who is a cousin of Frank McGrath, and assisted in the stable work. Her husband, it appeared, went to Ireland immediately after the sale, whence he did not return until about December 1st, following. On the night of December 7th, two of the horses, some harness, and a coach, all of which were embraced in the bill of sale, were taken from the wife's stable by the husband, and sold to defendant. When she made search for her property she called at the McGrath stable, but both the McGraths feigned ignorance, and promised their aid in searching for the property; five days later, she discovered it in the McGrath stable; it had been purchased, ostensibly by defendant from the husband, by regular bill of sale.

Plaintiff at once replevied it; defendant gave to the sheriff a claim property bond, and retained possession; in the issue made up he pleaded non cepit, and on this plea the case went to trial. The learned trial judge ruled that the plea admitted property in plaintiff, and rejected evidence tending to show a purchase of the property by McGrath from the husband. He also submitted the evidence to the jury to find whether there had been such flagrant wrong and deception on part of defendant as to warrant punitive damages. The jury found for plaintiff one thousand dollars damages, and we have this appeal by defendant, who assigns nine errors. The first two allege the court erred in not instructing the jury that the measure of damages was the actual value of the property at the time the writ was issued.

While appellant concedes that punitive damages may be allowed in replevin, yet it is urged it must be a rare case of misconduct where the jury will be allowed to exceed in their verdict the value of the property. That punitive damages in replevin may be allowed in all cases where there have been peculiar ⁵⁰¹ circumstances of outrage, oppression, and wrong in the taking or detention was settled by this court in *McDonald v. Scaife*, 11 Pa. St. 381, 51 Am. Dec. 556. The case was ably tried by Judge Lowrie in common pleas, and on appeal to this court was fully argued by able counsel on both sides, nearly all the authorities bearing on the question being cited. This court, Rogers, J., rendering the opinion, after a full review of the authorities and discussion of the subject, at the close of the opinion announces this conclusion: "On a review of the authorities, we have come to the conclusion that it is settled, on reason and authority, that although the ordinary rule is to give damages for the value of the goods taken, with interest, yet the jury may, under peculiar circumstances, go beyond it by giving exemplary damages, as in case of an action of trespass." What were the circumstances here? This woman purchased this property from a thriftless husband, who immediately deserted her; she undertakes to earn a living by conducting with it a stable for hire; almost immediately, she notifies defendant of her purchase, and exhibits to him the bill of sale; during some time, she interchanges business in emergencies with him, for he also carries on a livery stable; he knew this property was absolutely hers; in a few months, unknown to the wife, the worthless husband returns, and in the night-time secretly takes his wife's property from her

stable and sells it to defendant, who conceals it; when the wife makes inquiry of him he falsely alleges ignorance, and pretends to aid her in finding it; then she discovers it in his possession and replevies it, and the cause is for trial; he admits of record the property is hers and that he is wrongfully in possession, but seeks to retain it by beating the verdict down to the actual value at the issue of the writ, after he has had possession nearly four years; that is, after knowingly wronging her out of her property, he wrongfully withholds it from her for years, and then seeks to turn the transaction into a forced sale of the property at its actual value when taken. Plaintiff's evidence tended to establish these facts, and the jury believed it. These are peculiar circumstances of wrong and oppression; they show collusion by defendant with a dishonest husband to deprive a wife of her property. Such circumstances are peculiar, because it must be a rare case, taking the worst view of human nature, that a man will be guilty of such conduct. We ⁵⁰² think the court under the evidence and the law committed no error in instructing the jury that, if they found the facts as plaintiff alleged, they might find punitive damages.

The third and fourth assignments are to rulings of the court on admission of evidence offered by plaintiff. She offered in evidence the lease of the stable, and the assignments by her husband to her of a policy of fire insurance on the property, which against the objection of defendant the court admitted. The ruling was not error; plaintiff had a right to show, in addition to the bill of sale which she exhibited to defendant, the exclusive, open, and notorious character of her tenancy and possession. True, it was cumulative, but it was not for that reason irrelevant evidence. These assignments are overruled.

The fifth, sixth, seventh, eighth, and ninth assignments are to the rejection of evidence offered by defendant which tended to directly contradict his plea; that is, he attempted to prove that he had purchased the property from the husband, the ostensible owner, and paid him for it. The plea disclaimed any right of property in the things replevied; the court properly held that defendant could not disclaim property in himself, by plea, and then attempt to prove property in himself, when he had filed no plea making that an issue.

All the assignments of error are overruled, and the judgment is affirmed.

REPLEVIN.—EXEMPLARY DAMAGES are recoverable in replevin if there are circumstances of aggravation or outrage attend-

ing the taking or detention: *Notes to Herdle v. Young*, 93 Am. Dec. 744; *Yandle v. Kingsbury*, 22 Am. Rep. 285; but not where an officer in good faith levies on the property of a stranger to the writ: *Note to Carpenter v. Innes*, 25 Am. St. Rep. 258. Exemplary damages are discussed in the extended notes to *Tisdale v. Major*, 68 Am. St. Rep. 277-280; *Hoboken Printing etc. Co. v. Kahn*, 59 Am. St. Rep. 589-606; *Spellman v. Richmond etc. R. R. Co.*, 23 Am. St. Rep. 876, 883.

EWEN v. PHILADELPHIA.

[194 PENNSYLVANIA STATE, 548.]

MUNICIPAL CORPORATIONS—DISCRETIONARY POWERS—LIABILITY IN DAMAGES.—Municipal corporations are not liable to an action for damages, either for the nonexercise of, or for the manner in which in good faith they exercise, discretionary powers of a legislative character.

MUNICIPAL CORPORATIONS—DISCRETIONARY POWERS—DUTY TO GUARD DAM.—If a river is slackwater navigation, made so by a municipal corporation, duly authorized by statute, with power to erect dams, locks, and other appliances necessary for the purpose, and subject to a duty to maintain the navigation in a manner for practical use, such city is not subject to any duty to maintain safeguards across the river above a dam erected by it, in order to prevent boats or vessels from floating over such dam.

J. M. and C. Vanderslice, for the appellant.

E. S. Miller, assistant city solicitor, and J. L. Kinsey, city solicitor, for the appellee.

549 PER CURIAM. The river Schuylkill is a slackwater navigation, made so by a corporation duly authorized by state legislation, with power to erect dams and locks and other appliances necessary for the purpose, and subject to a duty to maintain the navigation in a manner for practical use. The dam at which the accident in question occurred is a part of the system of navigation thus established. We have not been referred to any authority declaring that either the navigation company or the city is subject to any duty to maintain safeguards across the river above the dam, in order to prevent boats or vessels of any kind from floating over the dam. In the absence of any legislation establishing such a duty, we fail entirely to discover any principle upon which a recovery can be based in such a case as this. In *McDade v. Chester City*,

117 Pa. St. 414, 2 Am. St. Rep. 681, we said: "When a legal duty has been imposed by statute upon a municipal corporation, it is undoubtedly liable for injuries resulting from the neglect of that duty; in such case it stands on the same footing in respect of negligence as a purely private corporation. . . . But the duty imposed must be absolute or imperative, not such as, under a grant of authority, is intrusted to the judgment and discretion of the municipal authorities; for it is a well-settled doctrine that a municipal corporation is not liable to an action for damages, either for the nonexercise of, or for the manner in which, in good faith, it exercises discretionary powers of a legislative character."

In the present case, no duty of any kind in this regard has been imposed, and hence the reasoning above stated is quite conclusive that there is not any basis of liability upon which a right of recovery can be set up. There was no real occasion for the accident in question except the want of proper care on the part of the persons who were running the vessel, and for ⁵⁵⁰ the want of such care the city, of course, is not liable. The authorities cited for the erection of barriers on the precipitous sides of public highways have no application.

Judgment affirmed.

A MUNICIPAL CORPORATION IS NOT LIABLE to an action for damages, either for the nonexercise of, or for the manner in which in good faith it exercises discretionary powers of a public or legislative character: *McDade v. Chester City*, 117 Pa. St. 414, 2 Am. St. Rep. 681. A municipality is not answerable in damages to one who is injured by its taking, or neglecting to take, strictly governmental action: *Bartlett v. Clarksburg*, 45 W. Va. 393, 72 Am. St. Rep. 817.

**REDMOND v. EXCELSIOR SAVINGS FUND AND LOAN
ASSOCIATION.**

[194 PENNSYLVANIA STATE, 643.]

ESTOPPEL—PERMITTING ERECTION OF BUILDING.

A property owner who stands and permits a building to be erected over an adjoining alley and into and against his own building, demanding no compensation and offering no objection thereto until six years thereafter, and during that time living on his adjoining property, is estopped from denying that he consented to the manner of building the adjoining house.

H. M. Tracy, for the appellant.

J. P. H. Jenkins, for the appellee.

645 GREEN, C. J. The special verdict determined the facts, and if upon those facts an estoppel was raised against the plaintiff which prohibited him from setting up his legal title the judgment should be sustained. It was found by the verdict that Redmond, the plaintiff, did agree, while the building was going up, that the building of Miss McAdams should extend over the alley which divided the plaintiff's house from the house in question, and into and against the plaintiff's house; that Redmond knew of and consented to this method of building, demanded no compensation and offered no objection thereto until six years afterward, and that during all this time, and while the building was going up, the plaintiff lived in his own house next door. We think the testimony was quite sufficient to sustain the verdict. The testimony of Miss McAdams was very full, precise, clear, and positive as to the fact of the agreement. Hallowell's testimony, while it was not so precise nor so clear as that of Miss McAdams, was quite corroborative in its character of the testimony of Miss McAdams. He said: "After the building was under way, during the course of the construction of the building, there was a conversation between Redmond and Rose McAdams as to the building her house against his side wall. It was talked of. I do not know what was said. I was under the impression that Mr. Redmond wanted to run it over, but I cannot say positive about that. . . . Certainly Mr. Redmond must have agreed that the house should be put over against his wall, or it would not have been done. He made no objection to me at all. He was present every day when I was building it. He saw I was

building against his property. . . . He was there every day. He lived next door, in the house that it was joined to. I never knew during the progress of the work that he objected to this."

All of this testimony is most highly corroborative of the testimony of Miss McAdams. He knew there was a conversation ⁶⁴⁶ between the parties, and that it was upon this very subject. But, above all, he was the contractor who erected the building, and necessarily knew just what he was doing, and he therefore said, "Certainly, Mr. Redmond must have agreed that the house should be put over against his wall, or it would not have been done." And this is the only rational conclusion that can be drawn from the circumstances. He further says that Redmond made no objection to it, and that fact is alone sufficient in such circumstances to raise an estoppel, because mere silence is equivalent to express consent in such a situation. But the testimony of Redmond himself is also strongly corroborative in some of its most important facts. It is true he says he never gave permission, but he also says he came home on the evening of the day when the joists were put into his wall and testified, "I said to her when I sat down to my supper, 'You said last night you were not going into my wall.' She says, 'Mr. Hallowell says it will make a better job on that side.' I says, 'Whenever you want to sell it you will make a great mistake.' She said, 'It was never going to be sold.' She said, 'I would never want it, but my children would fall into it.' She says, 'I know you will never want it.' She was my sister in law and was living in my house at that time. She lived in the house until her own was finished. . . . I never gave her permission. She took that permission. . . . I had a conversation with Rose and Mr. Hallowell before the joists were put up against my house, before they were put into my wall. . . . I did not agree to it. I did not agree to nothing. . . . When she had a chance to sell this property, about five years ago, was the first time I made any claim, because she had told me to be quiet, it would come to my own children, that she was not going to sell the property. That is the first time I made the complaint, and as soon as I found she was going to sell it, I stopped it." Thus it appears by the plaintiff's own testimony that, although he knew perfectly well that the building was extended over against his own all the time from the very commencement, and stood by and saw it done, he never made any

objection to it until after he learned she was going to sell the property, some five years later. This is not mere silent acquiescence; it is affirmative proof of express acquiescence founded upon an expectation that his own children were to get the property some day in the future. Whether that expectation was disappointed ⁶⁴⁷ is a matter of no consequence. The fact of the expectation, and of no objection being made, is only consistent with actual acquiescence. But, in any event, it is quite enough to raise the estoppel. Upon every principle, if he did not agree, it was his duty to speak when the work was going on, and arrest it. Failing to do this, he cannot be permitted to wait five years after the building was put up before his own eyes, and with his fullest knowledge, allowing all the expenditure to be made, without any protest or objection, and then set up a claim entirely inconsistent with all his previous conduct. It is almost unnecessary to cite the authorities. They are numerous and directly in point. In *Arnold v. Cornman*, 50 Pa. St. 361, we held that where a defendant built a wall across an alleged way with the full knowledge of the plaintiff who saw the erection progressing day by day without complaint or assertion of a right, it was not error to submit his acts and conduct to the jury as evidence of an estoppel in pais. In *Cumberland Valley R. R. Co. v. McLanahan*, 59 Pa. St. 23, we held that where plaintiff had knowledge of a building being erected and gave no notice of his claim he was estopped.

A party who stands by and sees a bona fide purchaser making valuable improvements upon the land in the neighborhood of which the former has resided for nearly twenty years, without giving notice of an equitable title in himself, will be estopped from subsequently asserting the same: *Woods v. Wilson*, 37 Pa. St. 379.

Silence will postpone a title when one knowing his own right should speak out. One led by such title ignorantly and innocently to rest on his title, believing it secure, and to expend money and make improvement without timely warning, will be protected by estoppel: *Chapman v. Chapman*, 59 Pa. St. 214.

One who by positive acts has induced another to purchase lands of which he is himself the true owner is thereafter estopped from setting up his title against the purchaser, even though he acted in good faith and in ignorance of his own rights: *Putman v. Tyler*, 117 Pa. St. 570; *Miller's Appeal*, 84 Pa. St. 391.

It is unnecessary to extend the citations; the principle involved is so very familiar that no discussion is required. The assignments of error are dismissed.

Judgment affirmed.

ESTOPPEL IN PAIS.—If one by his acts or conduct voluntarily causes another to believe in the existence of certain facts, and induces him to act upon that belief so as to change his previous position, the former is estopped to aver a different state of facts: Note to *Barton v. Pioneer Sav. etc. Co.*, 65 Am. St. Rep. 558. So one who stands by without making known his claim and suffers another to purchase and expend money on his land, under an erroneous opinion of title, cannot assert his legal right against such person: Note to *Williamson v. Jones*, 64 Am. St. Rep. 920.

CASES
IN THE
SUPREME COURT
OF
UTAH.

WILSON v. TRIUMPH CONSOLIDATED MINING Co.

[19 UTAH, 66.]

MINES AND MINING—LOCATION BY ALIEN—TRANSFER TO CITIZEN.—If a mining claim is located by an alien on unappropriated government land, and he and his representatives, claiming to be the owners thereof, perform all the acts and work necessary to keep the claim good until it is conveyed by them to a citizen, such conveyance vests the title in such citizen as between him and another citizen who takes subsequent possession of the claim, provided no rights of third persons have attached prior to such conveyance.

CORPORATIONS—CITIZENSHIP.—A corporation organized under the laws of a state is a citizen of that state.

MINES AND MINING—CITIZENSHIP.—While it is true, as a general rule, that only citizens of the United States can locate mining claims therein, yet the question of citizenship can be asserted only by the government, and it does not arise and cannot be considered in a contest between individuals in an action of ejectment.

MINES AND MINING—LOCATION BY ALIEN—RELOCATION.—A qualified locator may relocate a mining claim in the possession of an alien who has not declared his intention of becoming a citizen, provided such relocation is made without force and violence, and prior to such declaration. As against a mere intruder or trespasser the possession of the alien is prima facie evidence of a right thereto, but as against a person connecting himself with the government title, this mere occupancy must yield to the higher right.

MINES AND MINING—TITLE TO JUSTIFY POSSESSION. A lease and bond of a mining claim from an administrator under order of court and by consent of all persons interested and possession taken thereunder is a sufficient showing of title to justify possession and support an action of ejectment against a mere trespasser.

MINES AND MINING—SUFFICIENCY OF NOTICE OF LOCATION.—If notice of the location of a mining claim is recorded, it must contain the name or names of the locators, the date of the

location, and such a description of the claim located, by reference to some natural object or permanent monument, as will identify the claim. A reference therein to a known mining claim with date of its location, or to recorded claims adjoining it, with a hoisting shaft, is a sufficient compliance with the law requiring reference to be made to some natural object or permanent monument.

MINES AND MINING—WORK ON ONE CLAIM FOR BENEFIT OF SEVERAL.—If the evidence tends to show the consolidation of a group of mining claims for development and working purposes, and that the required amount of work was done on one claim for all, where they belong to one owner, the question of whether such work inures to the benefit of all of the property is properly left to the jury to determine.

J. W. Pike and H. L. Pickett, for the appellant.

Dey & Street and W. H. Bramel, for the respondents.

MINER, J. This action in ejectment was brought by the plaintiffs and appellants in Juab county against the defendant and respondent, to recover possession of a certain mining claim called the "Steeple Chase" by the appellants, and the "Mormon Chief" by the respondent, located in Tintic mining district, state of Utah. The appellants insist that the Steeple Chase mining claim was located January 1, 1897, by one R. C. Alexander, their grantor, upon unappropriated mineral land of the United States, subject to location in observance of all the laws of the United States, and the by-laws of the Tintic mining district, and that the appellants are the owners thereof subject to the paramount title therein in the United States, and that while the plaintiffs and their grantors were the owners and entitled to the possession of said Steeple Chase mining claim, the defendant, on the fifteenth day of January, 1897, entered into possession of said claim, and unlawfully withheld the possession of said claim from the plaintiffs, to their damage, etc.

It appears that J. F. Kappes, at the time of his death, September 24, 1895, was the owner of the Mormon Chief, which covers the same ground as the Steeple Chase, located August 10, 1882, by W. W. Hinch and O. T. McMillan. The Pride of the Hills mine was located August 11, 1885, by J. F. Kappes. The Sunday mine was located January 21, 1890, by J. F. Kappes and George Kappes. The Sunday Extension was located November 29, 1890, by J. F. Kappes, and the Silver Star was located January 29, 1892, by J. F. Kappes. These five claims were lying contiguous to each other. Notice of the consolidation of these five claims for working purposes, including the Mormon Chief,

was duly made and recorded, and the group consolidated on or before 1896. On November 9, 1895, Hugo Deprizen was appointed administrator of the estate of J. F. Kappes, deceased. The administrator expended five hundred dollars in assessment work on these consolidated claims in 1896, by running a tunnel in the Pride of the Hills mine, the work being completed on November 28, 1896. This work was done for development work, for the benefit of the five claims named. On December 24, 1896, Deprizen, as administrator, and under an order of the probate court, and by consent and agreement of all the heirs and parties interested in the estate of J. F. Kappes, deceased, entered into a contract to sell, bond, and lease said five claims to Valentine Kramer, for ten ⁷¹ thousand dollars, of which sum fifteen hundred and sixty-three dollars and thirty-one cents was paid in cash with an option to pay the balance in two years. Kramer went into possession and at work on the five claims in December, 1896, and continued at work until January 7, 1897. On January 11, 1897, Kramer assigned his contract to Kirby, and on February 12, 1897, Kirby assigned his contract to the respondent, a corporation organized under the laws of the state of Utah. From January 5, 1897, to the time of the trial, continuous work was done by the respondent and its grantors on the property. George Kappes had, previously to 1896, conveyed his interest in the claims to J. F. Kappes. The respondent, in its answer, denied all the allegations of the complaint, and alleged that the plaintiff had no right, title, or interest in said claims, and is not, and never was, entitled to the possession thereof. The Steeple Chase mining claim claimed by the appellants as having been located by their grantor, January 1, 1897, is the same ground as the Mormon Chief, included in said group, and conveyed by the administrator of J. F. Kappes, by lease, bond, and sale. This is the only claim involved in this litigation. The jury returned a verdict in favor of the defendant, and the plaintiffs appeal.

The appellants contend that after having made a *prima facie* case, and no sufficient evidence of the location of the claims appearing, that the court erred in refusing to instruct the jury that unless it appeared to their satisfaction, from the evidence, that George Kappes and J. F. Kappes, the persons who located the Pride of the Hills, were citizens of the United States, or had declared their intention of becoming such at the time of making of the location in question, they acquired no right under section ⁷² 2319 of the Revised Statutes of the

United States, and the location made under which the respondent claims, is invalid.

The five claims had been consolidated for the purpose of doing the work for the benefit of all upon one claim. The location notice for each claim was shown in evidence by the defendant, as was also testimony tending to show that the assessment work for 1896 was done on the Pride of the Hills for the benefit of the five claims, and evidence was given tending to show, in some degree, that J. F. Kappes was a citizen at the time he located the claims, and received a conveyance thereof from George Kappes.

The authorities bearing upon the question in issue are in conflict. From a review of all of them, upon this question, we conclude that if Kappes, although not a citizen, performed all the acts necessary to make a valid location of the claim, and claimed to be the owner thereof, as the proof tends to show, and that he or his administrator performed the work necessary to keep his claim good had he been a citizen, until the administrator, by order of the court and by consent of the heirs, conveyed the claim to the defendant or its grantors, and the defendant was a citizen of the United States when it received the conveyance, and after the conveyance to it took possession and control of the claims, and kept up the monuments and performed the necessary conditions to keep the claims good, its grantor, being a citizen, carried a good and valid right to the claims, as against the plaintiffs, from the date of the conveyance to it and its grantors, provided no other right attached in plaintiff's favor, prior to such conveyance and the subsequent performance of the required conditions by it and its grantors. The respondent being a corporation, organized under the laws of Utah, is a citizen of the state. No question is raised concerning the citizenship⁷³ of respondent's grantors. The defendant and its grantors acquired the conveyance before the plaintiff located his claim, and the title vested in the defendant, even although the original locator was an alien: *North Noonday Co. v. Orient Co.*, 6 Saw. 299; 9 Morr. Min. Rep. 529; *Manuel v. Wulff*, 152 U. S. 505; 1 Lindley on Mines, secs. 232-234.

This action does not involve the right of possession of any ground except the Mormon Chief. This is not an application for a patent, nor does the claim arise under section 2326 of the Revised Statutes of the United States.

After an examination of all the authorities, we conclude that, as a general rule, it is true that only citizens of the

United States can locate mining claims; but it has been held in the case of *Manuel v. Wulff*, 152 U. S. 505, that this is a question that can only be asserted by the government. In a contest by individuals, as in this case, which is an action in ejectment, that question does not arise. When a party applies for a patent, the government is interested, and in a case of that kind the citizenship of the parties must be shown before they would be entitled to a patent. This not being an action for a patent, but an action in ejectment for the possession of the Mormon Chief, the question of citizenship does not arise and cannot be considered. It is only for the government to make that objection on the ground of noncitizenship: *Billings v. Aspen Min. Co.*, 51 Fed. Rep. 338; *Billings v. Aspen Min. Co.*, 52 Fed. Rep. 250; *Lone Jack Min. Co. v. Megginson*, 82 Fed. Rep. 89; 1 *Lindley on Mines*, secs. 232-234; *Jantzen v. Arizona Copper Co.* (Ariz., Jan. 19, 1889), 20 Pac. Rep. 93; *Manuel v. Wulff*, 152 U. S. 505; *Croesus etc. Co. v. Colorado etc. Co.*, 19 Fed. Rep. 78; *Ferguson v. Neville*, 61 Cal. 356; *Goman Min. Co. v. Alexander*, 2 S. Dak. 557; *Osterman v. Baldwin*, 6 Wall. 122; *Wulff v. Manuel*, 9 Mont. 279; *Craig v. Radford*, 3 Wheat. 594.

The conclusions reached in 1 *Lindley on Mines*, section 234, and which appear to us to be sustained by the greater weight of authority and reason in a case like this, are: "1. An alien may locate or purchase a mining claim, and until 'inquest of office' may hold and dispose of the same in like manner as a citizen; 2. Proceedings to obtain patents are in the nature of 'inquest of office,' and in such proceedings citizenship is a necessary and material fact to be alleged and proved; 3. In all other classes of action between individuals with which the government has no concern, citizenship is not a fact in issue; it need be neither alleged nor proved."

These rules may be subject to the limitation that a qualified locator may relocate the claim in the possession of an alien, who has not declared his intention to become a citizen, if such relocation be made without force or violence, and prior to the declaration of intention of naturalization of the alien, or conveyance of his rights to the claim to a citizen. As against a mere intruder or trespasser, or one having no higher or better right than the occupant, possession of the mineral claim is prima facie evidence of a right of possession whether the occupant be an alien or not. But as against one connecting himself with the government title this mere occupancy must yield

to the higher right: 1 Lindley on Mines, secs. 216, 218; Sparks v. Pierce, 115 U. S. 408; Brandt v. Wheaton, 52 Cal. 430. We conclude that no error was committed by the court, in refusing the request.

It is also contended that the lease, bond, and contract of sale by the administrator to the defendant, was improperly admitted in evidence, and did not convey any right ⁷⁵ of possession. It appears that the lease and contract of sale was made by the administrator to the defendant by order of the court, and by consent of all the heirs and parties interested in the estate of J. F. Kappes, deceased, based upon a proper petition, and that the defendant was in possession thereunder by consent of all the interested parties. This as against a stranger not claiming under or through any party in interest, as well as against a trespasser, was a sufficient showing of title under which to justify possession: Smith v. North Canyon Water Co., 16 Utah, 194; Carpentier v. Small, 35 Cal. 346; Freeman on Judgments, 3d ed., sec. 335; Haws v. Victoria Min. Co., 160 U. S. 303; Zilmer v. Gerichten, 111 Cal. 73.

It is also claimed that the court erred in admitting evidence of the certificate of location of the Pride of the Hills Mine, on the ground that the location was not sufficiently tied to any natural object or permanent monument, so as to identify the claim. The certificate recites that the claim is located on the east side of the Mormon Chief Mine, and southeast of the Elmer Ray Mine, located August 11, 1885, together with a description of its boundaries and size, measured from the stakes and discovery shaft of the claim, in the Tintic mining district. The Mormon Chief Mine referred to, and also the Elmer Ray, were definitely known and staked. The Mormon Chief was located about four hundred feet southeast from the hoisting works of the Lock Ground mining claim on the Sunbeam lode in the same district. No objection was made to the introduction of the location notice of the Mormon Chief. We conclude that when a notice of location is recorded, it must contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some ⁷⁶ natural object or permanent monument, as will identify the claim. A reference therein to a known mining claim with date of its location, or to recorded claims adjoining it, with a hoisting shaft, is a sufficient compliance with law requiring reference to be made to some natural object or permanent monument. When the location is made upon a barren

hillside, the posting of notices at each of the four corners of the location, either by driving stakes into the ground, or building stone monuments so as to keep the stakes in place, is sufficient, if the locality is referred to by means of natural monuments, or other known locations, with date of location, so that the claim can be found and readily traced upon the ground, and it is in accordance with the legal rules and laws. In such cases the construction given the notice should be liberal and not technical. This construction is not in conflict with *Darger v. Le Sieur*, 8 Utah, 160, and is in conformity with the weight of authority: *Book v. Justice Min. Co.*, 58 Fed. Rep. 106; *Hammer v. Garfield Min. Co.*, 130 U. S. 291; 1 *Lindley on Mines*, 383; *Upton v. Larkin*, 7 Mont. 449, 728; *Riste v. Morton*, 20 Mont. 139. We are of the opinion that the notice of location was properly admissible in evidence.

Many objections were made to the admissibility of evidence based upon the ground that the locators were not citizens. This question, having been disposed of adversely to the appellants, requires no further consideration.

It is also contended that the group of claims, including the Steeple Chase or Mormon Chief, was one, and not held in common, and, therefore, work upon one of the group would not inure to the benefit of all.

The testimony tends to show the consolidation of these claims for development and working purposes, and that the required amount of work was performed on the Pride ⁷⁷ of the Hills for that year, to answer the requirements of the statute, upon all the claims, and that J. F. Kappes was the owner of all the claims, by location or assignment.

The court submitted all these matters to the jury, and we are unable to discover any reversible error in such instructions. We are of the opinion that the court committed no error in refusing to grant the requests of the appellants, as requested. We have given attention to all the several assignments of error, and conclude that no reversible error was committed.

The judgment of the district court is affirmed, with costs.

Bartch, C. J., and Baskin, J., concur.

MINES—RIGHTS OF ALIENS AS TO.—The mineral lands of the government are open to location and purchase only by a citizen of the United States, or one who has declared his intention to become such; but after the grant of title to mineral land, or the equivalent of such grant, is made to an alien, it cannot be attacked by a third party: *Justice Min. Co. v. Lee*, 21 Colo. 260, 52 Am. St. Rep. 216;

and a conveyance by an alien is good: See extended note to *McClintock v. Bryden*, 63 Am. Dec. 107. Under an early California statute prohibiting foreigners to mine without obtaining a license, it was held that the state alone could enforce the law: Note to *McClintock v. Bryden*, 63 Am. Dec. 107.

CORPORATIONS—CITIZENSHIP.—A corporation created by and transacting business in a state is to be deemed an inhabitant of such state, capable of being treated as a citizen for all purposes of suing and being sued: Note to *Railroad v. Barnhill*, 80 Am. St. Rep. 802. See, too, *Ireland v. Globe Milling etc. Co.*, 19 R. L. 180, 61 Am. St. Rep. 756, and note.

CROFOOT v. THATCHER.

[19 UTAH, 212.]

LIMITATION OF ACTIONS—CONFLICT OF LAWS—LEX FORI—LEX LOCI CONTRACTUS.—The *lex fori* controls as to the time within which a cause of action shall be enforced, but the *lex loci contractus* controls in determining when the cause of action upon a contract arises, so as to put the statute of limitations in operation.

CONFLICT OF LAWS—STOCKHOLDERS' LIABILITY. The liability evidenced by stock notes given by stockholders in a mutual insurance corporation, must be considered and enforced with respect to the laws in force when and where the contract is made.

LIMITATION OF ACTIONS—STOCKHOLDERS' LIABILITY—CALL OR DEMAND.—Stock notes payable by their terms on demand, made under the authority of a statute permitting one-half of the capital stock of a joint stock insurance company to be evidenced by the notes of the stockholders are not payable, and the statute of limitations does not begin to run against them until an actual call or demand has been made, or the corporation has been adjudged insolvent.

CORPORATIONS—UNPAID SUBSCRIPTIONS—STATUTE OF LIMITATIONS—DEMAND.—Unpaid subscriptions to the capital stock of a corporation are a trust fund, and the statute of limitations has no application thereto, and does not begin to run until an actual call or demand of payment is made, or until the corporation is adjudged insolvent.

CORPORATIONS—PROPERTY AS TRUST FUND.—Property of a corporation is a trust fund to the extent that it must be fairly and honestly applied to the purpose for which it was obtained, and held by virtue of the law creating the corporation, and in case of an express trust created by mutual confidence and contract of the parties, the statute of limitations does not begin to run until the cestui que trust has actual or constructive notice of the repudiation of the trust.

CORPORATIONS—PROPERTY AS TRUST FUND—STATUTE OF LIMITATIONS.—The property of a corporation, including notes for unpaid stock subscriptions, constitutes a trust fund for the benefit of creditors, and creates a right against which the statute of limitations does not begin to run until the beneficiaries have notice of the repudiation of the trust.

Action by the receiver of the Omaha Fire Insurance Company against defendants upon a note payable on demand alleged to have been made under the laws of Nebraska. Defendants demurred to the complaint on the ground, among others, that the cause of action was barred by the statute of limitations of Utah. The demurrer was sustained and judgment rendered dismissing the action. Plaintiff appealed.

J. E. Frick, for the appellant.

G. Q. Rich and A. T. Schroeder, for the respondents.

²²⁰ MINOR, J. Under the issue raised in this case, it is necessary to determine whether the laws of Utah or the laws of Nebraska govern and control in this case. It is conceded that the statute of limitations falls within the remedy, and the law of Utah controls in so far as the remedy is concerned as applied to an existing and enforceable cause of action. When the cause of action in fact arose, or whether or not any cause of action ever existed, or now exists, against the respondent, is not of the remedy, but of the right, and therefore is to be controlled by the law of the state where the contract sued upon was made, and the same is governed by the laws of that state. The law of the forum controls in respect to the cause of action, so far as the time within which it must be enforced is concerned, but the law of Nebraska controls as respects the time when the cause of action matured or arose under a contract made in pursuance of its laws. If, under the laws of Nebraska, no cause of action existed against respondent upon the note sued upon until the happening of a certain event, then the statute of limitations of Utah began to run only from the time such cause of action arose in Nebraska, and irrespective of what the laws of ²²¹ Utah might be. The statute of limitations applies only to existing causes of action.

Thompson in his work on Corporations, volume 3, section 3047, says: "If the liability of a resident stockholder of a foreign corporation rests in contract merely, as in case of the obligation to pay for shares of stock, which he enters into, who has subscribed for them, or who has purchased them from a subscriber or holder before payment, and if the obligation thus assumed is valid and subsisting according to the laws of the domicile of the corporation, it will be good everywhere, and, upon obvious principles, will be enforced in the court of every other state or country."

Mr. Beach, in his work on Private Corporations, in section 148, says: "Where a person becomes a stockholder in a corporation organized under the laws of a foreign state, he must be held to contract with reference to all the laws of the state under which the corporation is organized and which enter into its constitution; and the extent of his individual liability as a stockholder to the creditors of the company must be determined by the laws of that state, not because such laws are in force in the other state, but because he has voluntarily agreed to the terms of the company's constitution. It is equally clear, both upon principle and authority, that this liability may be enforced by creditors wherever they can obtain jurisdiction of the necessary parties. This does not depend upon any principle of comity, but upon the right to enforce in another jurisdiction a contract validly entered into. The validity, interpretation, and effect of the act imposing the liability are determined by the law of the state creating the corporation."

The liability claimed here is upon contract, and must be considered and enforced by courts in accordance with the laws in force when and where the contract was made. ²²² This is the rule in Utah: People's Bldg. etc. Assn. v. Fowble, 18 Utah, 206; Ferguson v. Sherman, 116 Cal. 169; Beach on Private Corporations, sec. 148; Hancock Nat. Bank v. Ellis, 166 Mass. 414, 55 Am. St. Rep. 414; Lowry v. Inman, 46 N. Y. 119; Mandell v. Swan Trust etc. Co., 154 Ill. 177, 45 Am. St. Rep. 124; Thompson on Corporations, sec. 1136.

Having determined that the law of Nebraska controls, it next becomes important to determine at what time the cause of action sued upon accrued for the purpose of enforcing the same for the benefit of the creditors of the corporation of which the respondent was a member and for whose benefit he made the stock or subscription note upon which this action was brought. As appears from the complaint, the stock note sued upon was made under the authority given by section 3, chapter 43, of the Compiled Statutes of Nebraska, entitled "Insurance Companies," and, so far as material, reads as follows: "No joint stock company shall be incorporated under the provisions of this act with a smaller capital than one hundred thousand dollars, nor more than one million dollars, as may be specified in the certificate of incorporation, which stock shall be divided into shares of one hundred dollars each, of which capital at least fifty per cent shall be fully paid up in cash, and that for the remainder of its capital there are in its possession notes of

its stockholders, secured by at least one surety or by mortgages on unencumbered real estate, within this state, worth at least twice the amount of such notes, which notes or other security shall be approved by the state auditor."

Subdivision 4 of article 11, entitled "Miscellaneous Corporations," of the constitution of Nebraska should be considered in connection with the above statute. It reads as follows: ²²³ "In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock."

The stock note sued upon reads as follows:

"\$1,250.

Omaha, Nebraska, April 24, 1889.

"On demand after date we, or either of us, promise to pay to the Omaha Fire Insurance Company, or order, \$1,250, for value received, payable at the Nebraska National Bank of Omaha, Nebraska.

G. W. THATCHER.

"S. T. JOSSELYN."

The object of the incorporation formed was to write contracts of insurance, insuring property of its owner against loss by fire. The statute required a capital stock of not less than one hundred thousand dollars, fifty thousand of which must be paid in cash; the remaining fifty thousand was required to be secured to be paid to the company by notes secured by one surety or by mortgages, and in such a manner as would be best calculated to secure payment of the same when needed and called for by those in whose hands the trust was imposed. No form of note was prescribed. The time of payment was left to the judgment of the members of the corporation. These officers made these stock notes payable "on demand," which was in accordance with the law and the probable business requirements of the corporation. Under these circumstances, was the note barred by the statute of limitations, as claimed by the respondent under his demurrer? The note was dated April 24, 1889, and ²²⁴ payable on demand, after date. This action was commenced May 27, 1898. The date of the insolvency of the corporation was the twenty-fourth day of February, 1896. The court determined the amount of the claims due, and that the property of the corporation was ex-

hausted December 27, 1897. No demand was ever made by the corporation or its receivers until December, 1897. The respondent claims that the note was negotiable in form, payable on demand, and therefore it was payable forthwith or within six months from date under the Utah statute, and within one year under the Nebraska statute; that its demand of payment could have been made at once, and, if not paid, the statute of limitations would at once commence to run in favor of the respondent. This claim is based upon the theory that the stock note was given in full payment and liquidation of the subscription for stock, and it should be treated the same as any ordinary note in any commercial transaction, and that it would be governed by the law applicable to negotiable instruments given in payment of ordinary debts. We are of the opinion that this contention is incorrect. The corporation required capital to pay losses and expenses. Losses are usually met by collecting premiums, but a condition may arise whereby losses overbalance the premiums, so that a fixed capital is required to meet all emergencies. The fifty thousand dollars cash capital had to be paid at once as a fund for all requirements. As the remaining fifty thousand might not be required at once, and possibly not at all, the law gave the stockholder the privilege of retaining it, but required notes to be given to evidence the obligation, with securities, so that the same could be collected when called upon by those in whose hands the trust was imposed. The statute and law under which the stock note was given, and the object and purposes of the law, the ²²⁵ object and contemplation of the parties availing themselves of the privileges of the law of Nebraska in forming the corporation, should control rather than the mere form and wording of the contract. The parties would hardly enter into a contract payable on demand if they intended the contract to be payable forthwith without any demand. Fifty per cent of the subscription was payable in cash at the time of the making of the subscription and the balance was to be represented by secured notes. To hold that the fifty per cent secured by the notes was due forthwith will be to hold that under the statute and the contract as made, that fifty per cent of the subscription was payable in cash and the balance payable forthwith, or in other words, that the whole capital stock should be paid in cash, or that which would amount to that. This construction would not be reasonable, but would be contrary to the plain reading of the statute and the intention of the parties in form-

ing of the corporation under it. When the stock notes were made payable on demand, the parties must have intended that they should be paid upon call by the corporation when it required part or all the proceeds thereof, and not before. This sum might be required very soon, and might not be required for years, and possibly not at all, but it remained a part of the capital stock of the corporation, to be used for the purposes and objects for which the capital stock was intended under the statute creating it, and the subscribers were liable on their promised subscription to the capital stock for the payment of its obligations. This subscription, whether paid in cash or represented by notes, was a part of the capital stock and could not be diverted or lost to the corporation by any fault of the corporate officers, or other devices.

In *Sawyer v. Hoag*, 17 Wall. 610, the court said: "Capital stock or shares of a corporation, especially ²²⁸ the unpaid subscriptions to such stock, or shares, constitute a trust fund for the benefit of the general creditors of the corporation. This fund cannot be defeated by simulated payment of the stock subscription nor by any device short of an actual payment in good faith."

Had the amount subscribed for been all paid in cash, it could not be claimed that any part of it would be diverted to any other purpose than to carry out the objects of the corporation. The rule as to unpaid subscriptions when the corporation becomes insolvent is enforced by courts in requiring that the same be applied for the benefit of the creditors. The creditor of the corporation would have no conceded right to call for these unpaid subscriptions while the corporation was solvent, regardless of the statute of limitations, and if the stockholders having the management of the corporation should refuse or neglect to call for such payment, possibly with intent of permitting a bar of the statute, the result might be to reduce the capital stock of the corporation one-half, to the wrong of the creditors and of the stockholders alike. So the courts have almost universally held that this capital stock is a trust fund for the benefit of the creditor of the corporation, and that the statute of limitations has no application and creates no bar until the creditors have had an opportunity to enforce payment of the unpaid portion of their claims, irrespective of the time that has elapsed between the making of the subscription and the insolvency of the corporation—the insolvency of the corporation being the cause that made it necessary to collect

such unpaid subscriptions. The statute of limitations does not commence to run until there is a cause of action. In this case no cause of action existed until after demand. The object and purposes of the parties under the statute and constitution forbids the construction that "on ²²⁷ demand" means forthwith. The parties must have intended the term "on demand" to have a special significance, and to mean on an actual call or demand for payment, and not merely to be governed by the law controlling ordinary negotiable instruments. To hold otherwise would be to obliterate from the case the object for which the stock notes were given.

The supreme court of New York, in *Williams v. Taylor*, 120 N. Y. 244, in discussing this subject says: "Where the thing promised is the payment of a sum of money, no actual demand will, in general, be necessary, notwithstanding the terms of the contract, but it is nevertheless in the power of the parties so to frame their engagements as to make a preliminary demand essential. And so likewise, though there be nothing in the terms of the instrument to take the case out of the general rule, the attending circumstances and the nature of the duty may be such that the words which mention a demand or request will have a special significance, and will require a preliminary demand to be made."

In the case of *Kilbreath v. Gaylord*, 34 Ohio St. 305, where the action was on a demand note like the case at bar, the court held that the statute of limitations did not apply to such demand notes. The court says: "The plaintiffs in error and their associates became incorporated for the purpose of carrying on the business of life insurance. The only means of the company for doing business consisted of its stock subscriptions. In payment, or to secure the payment of these subscriptions, the subscribers executed their non-negotiable notes to the company, payable on demand. These notes must be construed in connection with the nature of the business of the corporation, and in view of the object intended by the parties in giving the notes. The notes represented the ²²⁸ fund intended ultimately for the payment of debts if they should be required for such purpose. To hold that the statute of limitations began to run from the time of the execution of the notes would defeat the purpose intended, and work a fraud, not only on the policy-holders, but on such of the stockholders as might see fit to pay the cash in discharge of their liability."

In a similar case arising in Nebraska, *State v. German Sav. Bank*, 50 Neb. 734, the court construed and applied section 4 of article 11 of the Nebraska constitution. The court held—we quote from the syllabi: “1. That this statute refers to liabilities of stockholders upon their stock; 2. That the constitution makes the liability of subscribers for unpaid subscriptions for the purpose of paying debts of the corporation a secondary liability, to be enforced only after the amount of the debts has been judicially ascertained and other corporate property has been exhausted; 3. That a proceeding by the receiver of an insolvent bank to collect unpaid subscriptions to its capital stock, is on behalf of creditors of the corporation, and is a ‘case of claims’ against the corporation, within the meaning of the constitution; 4. That the statute quoted, in so far as it attempts to authorize actions to recover unpaid stock subscriptions before the corporate debts have been judicially ascertained and the corporate property exhausted, is in conflict with the constitution and void.” So, if there was no enforceable right of action, there could be no application of the statute of limitations.

In the case of *Van Pelt v. Gardiner*, 54 Neb. 701, by the supreme court of Nebraska, the court held that the statute of limitations does not apply until the property of the corporation is exhausted, and then the liability of the subscriber attaches: See, also, *Merrimac Min. Co. v. Levy*, 54 Pa. St. 227, 93 Am. Dec. 697.

²²⁹ In *Fear v. Bartlett*, 81 Md. 435, the court said: “In dealing with the defendant’s subscription, we have treated it as a Virginia contract. The company was chartered by that state, with its office and place of business in that state, and, although the subscription was made in this state, the contract was to be performed in Virginia, and, this being so, the rights and liabilities of the parties under it are to be determined by the law of that state.”

The leading case relied upon by the respondent in opposition to the principles here laid down is the case of *Howland v. Edmonds*, 24 N. Y. 307, 23 How. Pr. 159, and some other cases from New York. These cases are examined, and distinguished from the case at bar in a recent case from New York, reported as *Williams v. Taylor*, 120 N. Y. 244. As there held, these cases were all based upon the provisions of special statutes and determined accordingly. In *Williams v. Taylor*, 120 N. Y. 244, it was held that the statute of limitations would not com-

mence to run against the subscriber until a demand or call was made. The following cases bear upon the question or hold that unpaid subscriptions to the capital stock of a corporation is a trust fund, and that the statute of limitations has no application or does not begin to run until call or demand of payment is made or until the corporation be adjudged insolvent: *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92; 2 *Beach on Private Corporations*, secs. 568, 569; *Cook on Stock and Stockholders*, sec. 195; 2 *Thompson on Corporations*, secs. 2002-2007, 3779; *Hawkins v. Glenn*, 131 U. S. 319; *Hatch v. Dana*, 101 U. S. 210; *Hill v. Merchants' Ins. Co.*, 134 U. S. 515; *Scovill v. Thayer*, 105 U. S. 143; *Germantown Pass. Ry. Co. v. Fitler*, 60 Pa. St. 124, 100 Am. Dec. 546; *Ogden Clay Co. v. Harvey*, 9 Utah, 497; *Noble Mercantile Co. v. Mt. Pleasant etc.*, 12 Utah, 213; *Thomas v. Glendenning*, ²³⁰ 13 Utah, 47; *Ingwersen v. Edgcombe*, 42 Neb. 740; *Van Pelt v. Gardner*, 54 Neb. 701; *Herman v. Page*, 62 Cal. 448; *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74; *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 3 Am. St. Rep. 797.

This court has already held that the property of a corporation is a trust fund to the extent that it must be fairly and honestly applied to the purpose for which it was obtained and held by virtue of the law creating the corporation, and that in case of an express trust created by mutual confidence and contract of the parties the statute of limitations does not begin to run until the cestui que trust has actual or constructive notice of the repudiation of the trust: *Thomas v. Glendenning*, 13 Utah, 47; *Weyeth Hardware Co. v. James-Spencer-Bateman Co.*, 15 Utah, 110; *People's Bldg. etc. Assn. v. Fowble*, 18 Utah, 206; *Wood on Statute of Limitations*, 2d ed., 386; *Morse on Banks and Banking*, 2d ed., 39; *Hollins v. Brierfield Coal Co.*, 150 U. S. 371.

The property of the corporation was exhausted, and it became insolvent December 27, 1897. This action was brought in May, 1898. It appears to us that no cause of action existed before December 27, 1897, against the respondent. The unpaid stock subscriptions, including the note in question, constituted a trust fund out of which the debts due the creditors of the corporation, when the exact amount justly due thereon had been ascertained, and the corporate property had been exhausted should be paid.

We are of the opinion that in view of the statute and constitution of Nebraska, and in view of the decisions of the

supreme court of that state and other authorities bearing upon this question, that the court erred in sustaining the demurrer and in dismissing the action and in holding that the cause of action was barred by the statute ²³¹ of limitations. The case is reversed and remanded with directions to the district court to vacate and set aside the judgment, and to grant a new trial. Appellant is entitled to costs.

Bartch, C. J., and Baskin, J., concur.

CONFLICT OF LAWS.—THE LIABILITY OF THE STOCK-HOLDERS of a corporation must be determined by the laws of the state or county which created it: *Mandel v. Swan Land etc. Co.*, 154 Ill. 177, 45 Am. St. Rep. 124.

CORPORATIONS—UNPAID SUBSCRIPTIONS—LIMITATION OF ACTIONS.—In equity the capital stock of corporations, including especially unpaid subscriptions, constitutes a trust fund for the benefit of its creditors; and if stock is payable on call, the statute of limitations does not run against the right of creditors to enforce payment of unpaid subscriptions until a call or demand has been made, or until the corporation has ceased to be a going concern: See monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 808, 828.

CORPORATIONS—PROPERTY AS A TRUST FUND.—The stock and property of every corporation are to be regarded as a trust fund for the payment of its debts: *In re Brockway Mfg. Co.*, 80 Me. 121, 56 Am. St. Rep. 401; *Buck v. Ross*, 68 Conn. 29, 57 Am. St. Rep. 60.

LIMITATION OF ACTIONS—TRUSTS.—The statute of limitations will never run in favor of a trustee as against a cestui que trust until the former repudiates the trust, and notice of such repudiation is brought home to the cestui que trust: *Note to Chase v. Cartright*, 22 Am. St. Rep. 213. See, also, *Talbott v. Barber*, 11 Ind. App. 1, 54 Am. St. Rep. 491.

LIMITATION OF ACTIONS—CONFLICT OF LAWS.—See, on this subject, *Eingartner v. Illinois Steel Co.*, 103 Wis. 373, 74 Am. St. Rep. 871, and note.

WARREN v. ROBISON.

[19 UTAH, 289.]

CORPORATIONS—LIABILITY OF DIRECTORS—USE OF CARE AND PRUDENCE.—The directors of a corporation in administering its affairs must exercise ordinary care, skill, and diligence. They must give the business under their care such attention as an ordinarily discreet business man would give to his own concerns under similar circumstances, and it is incumbent upon them to devote so much of their time to their trust as is necessary to familiarize them with the business of the institution and direct its operations.

CORPORATIONS—LIABILITY OF DIRECTORS—DELEGATION OF AUTHORITY.—If the board of directors of a corporation delegate its business and the whole management and control thereof to its executive officers, they cannot, when disaster to the stockholders and creditors ensues through carelessness and mismanagement avoid personal liability on the ground that they did not know of the unfortunate transactions, and were ignorant of the business.

CORPORATIONS—LIABILITY OF DIRECTORS.—If directors of a corporation, acting in good faith and with reasonable care, skill, and diligence, nevertheless fall into a mistake, either of law or fact, causing financial loss, they cannot be held personally liable for the consequences thereof.

CORPORATIONS—LIABILITY OF DIRECTORS.—Directors of a corporation are not merely bound to be honest; they must also be diligent and careful in the performance of duties they have undertaken. They cannot excuse imprudence on the ground of their ignorance or inexperience, or the honesty of their intentions; and if they commit an error of judgment through mere recklessness or want of ordinary prudence or skill, they may be held liable for the consequences.

Me. D. Lessinger, A. J. Weber, E. Farr, and Bennett, Howat & Bradley, for the appellants.

Rogers & Johnson, R. H. Whipple, Marshall, Royle & Hempstead, for the respondents.

294 **BARTCH, C. J.** This action was instituted by the plaintiffs as stockholders of defendant Citizens' Bank, in behalf of themselves and all other stockholders, creditors, and others similarly situated, against the defendants for an accounting, and for damages alleged to have been occasioned by reason of negligence in the management of the bank by its directors and officers. It appears that the bank was organized about August 11, 1890, with a capital stock of \$150,000, and the banking business commenced soon thereafter. It failed and made an assignment for the benefit of its creditors, on December 26, 1893, and afterward a receiver was appointed. The defendants H. A. Spencer, George Murphy, Ad. Kuhn, John Maguire, R. A. Wells, Newall Beeman, George W. Perkins, S. S. Schramm, and W. W. Corey were directors. W. W. Corey was the first president, and Newall Beeman was the president when the bank failed. The defendant Theodore Robison was vice-president and manager, and Charles M. Brough was cashier. J. C. Armstrong was receiver. The transactions which resulted disastrously to the bank, and which, it is claimed, were made because of the negligence of the directors and officers, are of such a character as to require careful investigation. It is certainly quite startling to notice that a bank ²⁹⁵ in the hands

of honest business men, as the directors and officers were reputed to be, should in so short a space of time meet with so many heavy losses as to actually wreck the institution. The losses, it appears from the testimony, began immediately upon the commencement of the business, as is evidenced by the shortage of Barbour, the first cashier, who, although a banker of good reputation, was, it seems, a stranger to the directors. He was placed in charge of the funds of the bank without first having given a bond, as required by the articles of incorporation, in respect to active executive officers, and, through the leniency of the directors, had given no bond at the time of his death, which occurred about three weeks after the commencement of the corporate business. Then, upon the cash being counted, a shortage of \$3,600 was discovered which resulted in a total loss. Soon after the organization of the bank, the Anderson Pressed Brick Company, a new corporation, became one of its customers, and loans were made to it, which resulted in a loss to the bank of \$22,000. That corporation was capitalized at \$50,000, and one witness said its plant was worth in the neighborhood of \$45,000, while other witnesses estimated its value to have been, about the time the loans were made, from \$12,000 to \$20,000. One of the directors of the bank was also a director in the brick company. After the loans were made, security was taken on the plant, but, owing to a misdescription in the mortgage, the security proved to be worthless, after the company had become otherwise involved and judgment had been entered against it. In 1891, the Junction City Driving Park Association was organized for the purpose of promoting an interest in horses. Several directors of the bank also became directors of the association, and the president of the bank was its president, and the vice-president ²⁰⁰ of the bank was the treasurer of the association. Through this association, by way of loans and overdrafts, made and permitted, it appears, without security, the bank lost about \$1,700. So the Junction City Paint Company borrowed of the bank \$4,750, and afterward another creditor, it appears, attached the property of the company, and then the bank bought in the stock for \$4,360, paid off the judgment of the creditor, and carried on the paint business, under the name of H. Gillette & Co., until a purchaser was found for the stock. The loss to the bank occasioned by this transaction was over \$9,000.

The bank was also unfortunate in dealings with Corey Brothers & Co. Its president, W. W. Corey, was a member of

that firm, and the firm borrowed money from the bank from time to time, without security, until, when it failed in business and assigned, it owed the bank \$28,000. The firm had also borrowed from another bank about \$70,000, but that, it seems, was secured by real estate. The evidence relating to the transactions resulting in the \$28,000 yet remaining unpaid, is such, to say the least, as to raise a strong suspicion of negligence on the part of those whose duty it was to supervise the affairs of the bank; and it savors much of a violation of law.

The loan to James C. Lonergan of \$700 also resulted in a loss to the bank. This loan was recommended by one of the directors, and was made without security. So, it appears the bank lost \$3,200, through loans and overdrafts, without security, except some bank stock, to Theodore Robison, its manager. Likewise its cashier, Helfrich, made overdrafts and received loans, which resulted in a loss to the bank of \$6,375. The overdrafts, it appears, he began to make in October, 1890.

Another loan which proved unfortunate and a loss to ²⁹⁷ the bank, was one of \$10,000 to the Cache Valley Land and Canal Company. The plaintiffs claim this loan was made indirectly to the officers of the bank. It appears that Robison, the manager of the bank, was also president of the Canal Company; that Brough, the bank's cashier at the time of the loan, was treasurer and director of that company; and that Corey, the president of the bank, was vice-president and a director of the company. The canal and property of that company was situated in the state of Idaho.

Such are the losses complained of in this case, and, as will be noticed, they aggregate over \$84,500. At the trial, when the plaintiffs rested their case, various motions for nonsuit were made, and, upon argument, granted by the court, except as to defendant W. W. Corey.

The important question presented is, Did the plaintiffs make out a prima facie case? To determine this, it is necessary to consider first the degree of care and diligence and the extent of supervision which must be exercised by directors and officers of a banking institution, so as to discharge their duty to stockholders and creditors, and then ascertain whether, under the evidence as it now appears, all or any of the defendants exercised such supervision, skill, and diligence, as the circumstances and nature of the business required.

It is not contended that the directors knowingly permitted any violation of law in any banking transaction, or that they

were dishonest in the administration of the bank's affairs, but it is insisted that they wrongfully intrusted the exclusive management and control of the banking business to the cashier and manager, and were negligent in the performance of the duties imposed upon them by law.

²⁰⁸ The statute under which this bank was incorporated, and its business transacted, is found in the Compiled Laws of Utah of 1888, and provides in section 2498, subdivisions 5 and 7, as follows:

"To elect by its stockholders, directors from time to time, and by its board of directors, to appoint a president, a vice-president, cashier, and such other officers as shall be provided for in its articles of association, define their duties, require bonds of them, and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

"To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking by discounting or negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits, by buying and selling exchange, coin, and bullion, and by loaning on personal or real security."

No doubt the board of directors of a bank incorporated under the act, of which these provisions form a part, may appoint executive and other officers, as therein provided, and may "carry on the business of banking" through such officers, but this does not release the directors from the duties which devolve upon them. It does not follow that the responsibility of the board, or of the individual director, ends with the appointment of honest men to the executive offices. The language of the statute does not enable the directors to say that they have no duties of supervision and control. If it had been the intention of the legislature that the officers provided for should have full control, without supervision, of the business transactions and affairs of a bank, then it would have been a useless thing to provide for a board of directors, for the stockholders could elect such officers as ²⁰⁹ easily as they could the board. The legislature had in view no such purpose. The directors were not intended to be mere figureheads without duty or responsibility. The manifest design of the law-makers was that the officers, elected by the board, were to look after and attend to the details of business, and generally to conduct ordinary business matters. They are the means with which the directors

are to administer the affairs of the bank. It is, therefore, the right and duty of the directors to take upon themselves the management of the institution, and to exercise and maintain a supervision over all business operations upon the skillful and wise conduct of which depend the prosperity of the institution and the safety of those dealing with it. This duty of management and supervision they cannot shift upon the officers, and such duty is imposed as to no department of the banking business more certainly than that of making loans and discounts: *Morse on Banks and Banking*, sec. 117.

It is true the executive officers attend to and execute the details of the transactions of the institution, but it is nevertheless incumbent upon the board of directors to possess a general knowledge of the character of the transactions and of the manner in which they are made. While such directors are not required to watch the ordinary routine of business or observe the exact state of each day's accounts, still they are bound to possess a general knowledge of the manner in which the business is transacted, and of the character of the transactions, and to maintain such a degree of vigilance over, and intimacy with, the business as will enable them to know to whom, and upon what security, the large lines of credit are given. Especially is this so as to large loans and discounts, or matters at once affecting the stability ^{and} prosperity of the bank, and the safety of depositors. It is true directors of a banking institution will not be held responsible for sudden and unexpected violations of law or duty by executive officers, or for losses which ordinary vigilance could not prevent. Nor is a director responsible for acts committed, transactions made, or losses incurred before he became a member of the board, or for any act of the board done in his absence and without his knowledge and assent, or for the default of a codirector made without his connivance or assent: *Briggs v. Spaulding*, 141 U. S. 132.

The duties of officers appointed by the board are of an executive character and relate mainly to details, and doubtless the making of a loan or discount in any considerable amount, or the transaction of other business of moment, should be preceded by an authorization from the board. The duties of directors are administrative, relate to supervision and direction, and when it is sought to hold them responsible for a dereliction of duty, because of which a loss occurred to stockholders and creditors, they cannot evade liability by pleading ignorance of

the affairs of the institution, incompetency, or gratuitous service, or that the management of the banking business was in the hands of the cashier or other executive officer.

"Where there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge. While the directors of a corporation may and must, as already stated, commit the details of its business to inferior officers, this does not absolve them from the duty of maintaining a reasonable supervision, and if such inferior officers waste the assets of the corporation, it is conceded that the directors cannot escape liability on the ground that they did not know of the wrongdoing, provided that it appear that their ignorance ³⁰¹ was the result of a want of that care which ordinarily prudent and diligent men would exercise under similar circumstances": Thompson on Corporations, sec. 4108. And their liability does not depend upon statute. "The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common-law rule which renders every agent liable who violates his authority to the damage of his principal. A statutory prohibition is material under these circumstances merely as indicating an express restriction placed upon the powers delegated to the directors when the corporation was formed": Morawetz on Private Corporations, sec. 556; Brinckerhoff v. Bostwick, 88 N. Y. 52.

Such is likewise the case where damages have resulted to stockholders and creditors through unauthorized acts or omissions of duty in the management of the corporate business. Nor is such liability affected by the technical relation existing between the directors and the corporation, stockholders, or creditors. It exists whether the relation be that of trustees to cestui que trust, or of agents to principals. Doubtless, as between the bank and a director, it is mainly that of principal and agent, while under some circumstances the relation of trustee to cestui que trust may exist. Whatever the technical relation may be, to determine what acts or omissions amount to actionable negligence is a matter of no little difficulty. Undoubtedly, each case must depend upon its own peculiar circumstances. The opinions of judges, respecting the degree of care, skill, and diligence which directors of a banking institution must exercise in order to avoid liability for negligence, are not all harmonious. That they must exercise some degree of care and diligence is not subject to controversy. What degree of negligence will render them liable? What degree of

care and diligence must they exercise to avoid liability? Some of the courts have ³⁰² held that such directors are liable only for *crassa negligentia*, which, taken literally, means gross negligence. That phrase, however, has been held to mean a want of ordinary care and diligence. In *Scott v. Depeyster*, 1 Edw. Ch. 513, the vice-chancellor said: "I think the question in all such cases should and must necessarily be whether they have omitted that care which men of common prudence take of their own concerns. To require more would be adopting too rigid a rule and rendering them liable for slight neglect; while to require less would be relaxing too much the obligation which binds them to vigilance and attention in regard to the interests of those confided to their care and expose them to liability for gross neglect only, which is very little short of fraud itself."

In *Spering's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684, Mr. Justice Sharswood said: "They [directors] can only be regarded as mandataries—persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, but no more."

In 3 *Thompson on Corporations*, section 4104, the author says: "While a class of decisions places the liability of directors under this head on a ground more favorable to them, by restraining it to cases of gross and habitual negligence, non-attendance, and inattention to their duties, yet none of the decisions exact more than reasonable business knowledge and skill, strict good faith, and a reasonable measure of care and diligence under the circumstances of the particular case." And in section 4106, he says: "It is plain that the expression 'gross negligence' is loosely used in many of the judicial decisions, and that it is sometimes used as the mere antithesis of a want of ordinary care": *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546; *United Society of Shakers v. Underwood*, 9 Bush, 609, 15 Am. Rep. 731. ³⁰³ Evidently persons who, as directors, assume control of a banking institution must exercise such a degree of care, skill, and diligence as is required by the situation and nature of the business. By taking such positions, although without compensation, directors invite confidence that they possess at least ordinary knowledge and skill, and that they will do all that men of reasonable prudence and caution ought to do to protect the interests of stockholders and depositors, or those dealing with the institution. The public, therefore, have a right to suppose that they are men of high character for integrity, of reasonably sound judgment, and of such good busi-

ness sense as is necessary to conduct the affairs of the bank wisely and with reasonable safety. Acting upon this supposition, the public trust their deposits with the bank in the confidence that the important duty of management and direction will be discharged by the directors. The directors, however, ought not to be held to the highest degree of care and diligence, for that might prevent men whose unspotted reputations and good business judgment would give character and stability to the institution, from accepting such positions; nor should they be held to the slightest degree, for that would have a tendency to destroy public confidence, and few men would be willing to deposit their money with the bank. The rule most in harmony with the character and well-being of such an institution appears to be that the directors in administering its affairs, must exercise ordinary care, skill, and diligence. Under this rule it is necessary for them to give the business under their care such attention as an ordinarily discreet business man would give to his own concerns under similar circumstances, and it is therefore incumbent upon them to devote so much of their time to their trust as is necessary to familiarize them with the business of the institution, and to supervise³⁰⁴ and direct its operations. That the board of directors can leave the management of the banking business to the executive officers, and then when, through carelessness and mismanagement, disaster to the stockholders and creditors ensues, avoid liability on the ground that they did not know of the unfortunate transactions, and were ignorant of the business, is a notion which must be repudiated. If, however, directors acting in good faith, and with reasonable care, skill, and diligence, nevertheless fall into a mistake, either of law or fact, they will not be liable for the consequences of such mistake.

Bearing upon the general subject herein discussed is the very instructive case of *Charitable Corp. v. Sutton*, 2 Atk 400, where the action was brought for relief against the defendants, committeemen, and other officers of a corporation, for breaches of trust, fraud, and mismanagement, and in which were involved questions of the liability of directors. Among the objects of the corporation was that of banking with notes payable on demand within the amount of the stock, and of lending money on pledges, etc. Among the things complained of was a method of advancing money several times upon old pledges, which were not worth more than the first sum lent,

or giving credit upon imaginary pledges. Under the charge of *crassa negligentia*, the breaches of duty, amongst others, complained of were nonattendance of committeemen or directors upon their employment, never once inspecting the warehouse to see what number of real pledges were there, and putting the whole power into the hands of others. Lord Chancellor Hardwicke, conceding that the employment was not one affecting the government, said: "I take the employment of a director to be of a mixed nature; it partakes of the nature of a public office, as it arises from the charter of the crown. . . . ³⁰⁵ Therefore, committeemen are most properly agents to those who employ them in the trust, and who empower them to direct and superintend the affairs of the corporation. In this respect they may be guilty of acts of commission or omission, of malfeasance or nonfeasance." Referring to malfeasance or nonfeasance, the chancellor said: "To instance in nonattendance: if some persons are guilty of gross nonattendance, and leave the management entirely to others, they may be guilty by this means of the breaches of trust that are committed by others. By accepting a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence; and it is no excuse to say that they had no benefit from it, but that it was merely honorary; and therefore they are within the case of common trustees. Another objection has been made, that the court can make no decree upon these persons which will be just, for it is said every man's nonattendance or omission of his duty is his own default, and that each particular person must bear such a proportion as is suitable to the loss arising from his particular neglect, which makes it a case out of the power of this court. Now, if this doctrine should prevail, it is indeed laying the ax to the root of the tree. But if, upon inquiry before the master, there should appear to be a supine negligence in all of them, by which a gross complicated loss happens, I will never determine that they are not all guilty. Nor will I ever determine that a court of equity cannot lay hold of every breach of trust, let the person be guilty of it either in a private or public capacity."

In *Land Credit Co. etc. v. Lord Fermoy*, L. R. 5 Ch. 763, Lord Hatherley said: "I am exceedingly reluctant in any way to exonerate directors from performing their duty, and I quite agree that it is their ³⁰⁶ duty to be awake, and that their being asleep would not exempt them from the consequences of not

attending to the business of the company. But we must look at the nature of the business of the company."

So, in *Briggs v. Spaulding*, 141 U. S. 132, 165, a case on which the respondents appear to rely, Mr. Chief Justice Fuller, speaking for the court, said: "Without reviewing the various decisions on the subject, we hold that directors must exercise ordinary care and prudence in administration of the affairs of a bank, and that this includes something more than officiating as figureheads. They are entitled under the law to commit the banking business, as defined, to their duly authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention."

In that case the law seems to be stated with much liberality in favor of directors, and it seems a very liberal application of the law to the facts was made in favor of the defendants, and four of the jurors dissented, but still the conclusion was reached that directors must exercise ordinary care and prudence, holding that the committing of the banking business by them to the officers does not absolve the directors from reasonable supervision.

In *Cutting v. Marlor*, 78 N. Y. 460, Mr. Chief Justice Church said: "A corporation is represented by its trustees and managers; their acts are its acts, and their neglect its neglect. The employment of agents of good character does not discharge their whole duty. It is misconduct not to do this, but in addition they are required to exercise such supervision and vigilance as a discreet person would exercise over his own affairs. The bank might not be liable for a single act of fraud or crime on the part of an officer or agent, while it would be for a ³⁰⁷ continuous course of fraudulent practice, especially those so openly committed and easily detected as these are shown to have been. Here were no supervision, no meetings, no examination, no inquiry."

So, in *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775, where the observations of Lord Chancellor Hardwicke and Hatherley were referred to with approval, Mr. Chief Justice Beasley, delivering the opinion of the court, said: "I entirely repudiate the notion that this board of managers could leave the entire affairs of this bank to certain committeemen, and then, when disaster to the innocent and helpless cestuis que trustent ensued, stifle all complaints of their neglects by say-

ing, We did not do these things, and we know nothing about them." And again he said: "The misconduct in question was manifested in frequent, glaring instances, and it is not easy to imagine how they, or some of them, failed to be discovered by these boards of managers on the supposition which, in their favor the law will make, that they exercised their office in this respect with a reasonable degree of vigilance. The neglectful acts in question cannot be regarded by the court as isolated instances, for they run through the whole period of the life of this institution, and thus evince a systematic and habitual disregard of the directions of the company's charter, and a very striking indifference with regard to the security of the money held in trust by them."

In *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546, where the question of the degree of vigilance to be exercised by directors of a savings bank was involved, Mr. Justice Earl, speaking for the court, said: "Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as ³⁰⁸ inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trusts committed to them, the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such a degree of care and prudence, and it is a gross breach of duty—*crassa negligentia*—not to bestow them."

So, in 3 Thompson on Corporations, section 4108, with reference to the liability of directors for negligent ignorance of corporate affairs, it is said: "The true theory disregards the subtle and impracticable distinction between ordinary negligence and inattention and gross negligence and inattention, and holds directors responsible for not knowing that of which they had the means of knowledge; and while relieving them from the responsibilities of insurers, ascribes liability on the

ground of ignorance of that which could have been discovered by that good business diligence which is incumbent upon them": 1 Morse on Banks and Banking, secs. 116, 125, 126, 128; 1 Morawetz on Private Corporations, secs. 552-562; 1 Reid on Corporate Finance, sec. 181; 3 Thompson on Corporations, sec. 4113; 2 Am. & Eng. Ency. of Law, 114-116; Gibbins v. Anderson, 80 Fed. Rep. 345; Marshall v. Farmers' etc. Sav. Bank, 85 Va. 676, 17 Am. St. Rep. 84; Houston v. Thornton, 122 N. C. 365, 65 Am. St. Rep. 699; Horn Silver Min. Co. v. Ryan, 42 Minn. 196; ³⁰⁰ Cumberland Coal etc. Co. v. Parish, 42 Md. 598; Ackerman v. Halsey, 37 N. J. Eq. 356; Delano v. Case, 121 Ill. 247, 2 Am. St. Rep. 81; Martin v. Webb, 110 U. S. 7; Trustees Mut. Bldg. Fund v. Bosseieux, 3 Fed. Rep. 817; Brannin v. Loving, 82 Ky. 370; Stephens v. Monongahela Nat. Bank, 88 Pa. St. 157, 32 Am. Rep. 438.

Having thus, in the light of authority, considered the degree of care, skill, and diligence which directors of a bank must exercise to avoid liability for acts of commission or omission which result in loss to the institution, its stockholders, or creditors, it now becomes important to ascertain whether, under the evidence in this case, as it now stands, the defendant directors are shown guilty of such negligence as will render all or any of them liable for the losses occasioned by the transactions of which the appellants complain; and the alleged liability is such that facts must be examined as to each of them.

The testimony shows that the defendant Beeman was elected director and president of the bank in January, 1893. But one of the loans complained of was made during his term of office, and that was the one to the Cache Valley Land and Canal Company, which was made without his knowledge or consent. After he became director and president, he was for some time necessarily absent from the state. He attended various meetings of the board, advised with the manager and cashier, examined the books, notes, accounts, bills receivable and payable, and about the middle of August discovered the \$10,000 loan of the canal company. Thereupon, it appears he required a statement of the affairs of the bank from the manager, and upon receiving the same and making an examination of it, and submitting it to another banker for advice, he, on August 23, 1893, wrote a letter to the manager in which he in effect deplored the condition of ³¹⁰ the bank, criticised the manner of making loans, especially to officers of the institution, instancing the \$28,000 loan to the former president, stated that no loan

should be made to an officer, even with ample security, without the unanimous consent of the board of directors, and maintained that the board should vote on all loans above a certain amount, and that overdrafts should be put in the form of notes. In fact, the letter is such as would naturally come from a discreet business man, and indicates a desire, on the part of the writer, to institute a prudent and diligent administration of the affairs of the institution. The evidence fails to show that the disastrous consequences to the bank, stockholders, and creditors could have been avoided even by the highest degree of care and vigilance after he assumed the duties of office. Under these circumstances, the court would not have been warranted in holding him liable, and therefore, as to him, the nonsuit was properly granted. We are also of the opinion that the nonsuit was properly granted as to defendants Maguire and Perkins. It appears they were elected directors about July, 1893, after all the loans complained of had been made, and the plaintiffs failed to make a *prima facie* showing that the crisis, which came a few months later, was due to any negligence committed by them, or that it could have been averted by any care or vigilance which they could have exercised.

We are further of the opinion that the plaintiff failed to make out a *prima facie* case as to defendant Armstrong, the receiver. The defendant, Robison, it appears, was not properly before the court, hence his case calls for no consideration from us. Respecting the remaining defendants, the ruling of the court in granting the nonsuit presents a much more serious question, under the evidence. As to them, the testimony appears to show a ³¹¹ different state of facts. Defendant Spencer was elected as a director and member of the executive committee in January, 1892. It was the duty of the executive committee to make and pass on loans. Testifying as a witness, he said that he examined the Corey loan of \$28,000, and thought that most of it was made before he was director. He knew that Corey was an officer of the bank, but did not recollect as to any security for the loan. Was aware of the Gillette & Co. transaction, but did not know whether the debt was for loans or overdrafts. He knew what his duties were as a member of the executive committee. The witness said: "The executive committee met every two or three months. I have explained that the loaning was principally intrusted to Robison and Brough. Frequently, when I was in the bank, Robison

would ask me what I thought about certain loans. I don't know whether I was an officer of the Junction City Driving Park or not. I was a director, I believe. The Eccles Lumber Company is a corporation. I am a member of that. We attached the driving park. I don't know when the loan was made to the driving park, or whether they had any personal property at the time or not. We didn't examine the books of the bank very often; we generally looked at the notes and counted the money on hand and looked at the cash-book as to the amount they should have. We did not audit the books as a rule; we never examined them."

The witness was on Helfrich's bond, but did not know that he had overdrawn, and said they gave the privilege to overdraw accounts to no one. Matters of loans were generally left with the manager and cashier.

Defendant Murphy became director in 1891, and, as a witness, said: "I know most of the loans complained of in this case. I had nothing to do with them at the time ³¹² of the making of the loans. I knew nothing about them at the time. I only know what I have heard since about the condition of the Cache Valley Land and Canal Company transaction, and the loan made to the Cache Valley Land and Canal Company. I didn't pass on the loan at the time it was made or at the time of the renewal."

Defendant Kuhn assumed the duties of director in January, 1891. As a witness, he, in part, said: "I was one of the executive board of the bank. I don't believe that as a member of that board I passed upon the Anderson Pressed Brick Company loan. I was in the bank quite often; I very seldom looked at the books. I had an opportunity of looking at them at any time. I looked at the daily blotter once in a while. During all the time I was a director I was a member of the executive board. I remember that Corey got some money there. I passed upon the loan at the time. I think it was \$2,500 that he wanted. I have been in business here sixteen or eighteen years. I have a man to keep our books. I do not understand bookkeeping. I could probably find an account if I took time for it. I knew that the bank was discounting paper and making loans. I knew its general class of business."

He was aware of the Barbour shortage and other transactions of which complaint is made. The loan to the Cache Valley Land and Canal Company was made while he was absent from the state. Sometimes he was absent on business

two or three months at a time. He heard of and noticed nothing to arouse suspicion, and had confidence in the manager.

So the defendant Wells testified: "I don't know about the Cache Valley note transaction. I never looked it up or had anything to do with it. I never examined the books of the bank, or counted the cash. I remember ³¹³ when Barbour was accused of being short in his accounts. It was at the time of Robison and Corey's giving their note. I was a director at the time. Robison and Corey told me and gave the directors to understand that they would stand good for that shortage. . . . I was one of the executive board, appointed in 1891. As a member of the board, I did not pass on any of the loans at that time. Nor did any of the board in my presence pass on any loan. I was in some of the meetings. Kuhn, Spencer, and Cahoon were the other members of the committee, I think. When I was a member of the executive board, I never passed on any loans; I left the whole matter to Helfrich and Robison, and delegated my power to them."

On cross-examination the witness said: "I was one of the first directors, and was appointed upon the executive board to pass upon the sufficiency of securities and such as that. I attended meetings and had stock in the bank. We did not have the list of notes, or the note pouch placed upon the table. The books were there, but I never was at a meeting where they examined any of the notes. I knew what my duties were and understood the purpose of my appointment. I knew that the stockholders were looking to me to protect their interest; but I didn't do it. I just let it go by default. I don't suppose the other members of the board were as derelict as I was."

The testimony of defendant Corey is in part as follows: "I was the first president of the Citizens' Bank. I do not think that J. P. Barbour, the first cashier, gave a bond while acting as such. I did borrow money in March, 1893, and at different times from the bank, while president. I do not remember how much. I did not give any security at that time. Robison passed on the ³¹⁴ loan. I do not remember anything about a \$3,700 note. I do remember about an indebtedness of mine and the Corey Brothers for \$28,000. We borrowed the money from the bank from time to time, and would take up one note and give another one at different times. It might be that I got money on my individual note, I do not remember. We left our bank stock as security. I cannot recollect the dates of the notes, but I know that we borrowed for the company

there. I think the aggregate was something like \$28,000. The company failed in the fall of 1892, about October or November. We owed the First National Bank at that time in the neighborhood of \$70,000. We gave them good real estate security as far as it went. I did not make any effort to get security for the Citizens' Bank. I did not borrow \$8,000 of them after we failed. As president of the bank, I believe I was elected as a director of the Cache Valley and Land Canal Company. I did not know anything about the canal company transaction. The truth is I was only nominal president of the bank. I presided at meetings, and every day I was in the city I looked around after the interests of the bank. I was interested in the Junction City Driving Park Association and was president of it. I don't know much about the loans or overdrafts of the Driving Park Association. I don't know whether or not the directors approved of the loans to the A. P. B. Co. I knew in a general way that they were making loans. I did not know anything about the details of the loans at the time they were made. I wasn't manager or anything of that kind. I couldn't tell you how many meetings I presided over. I never missed a meeting while I was in the city, that I know of. Sometimes they held two or three meetings a month, and sometimes one."

The defendant Schramm, another director, gave testimony ³¹⁵ as follows: "I was a stockholder from the inception of the bank, down to December, 1893. I was generally at all of the meetings of the directors of the Citizens' Bank. I couldn't say how many meetings I would attend during the year. I had a very slight acquaintance with Barbour. The directors requested him to furnish a bond shortly after the bank was organized. The directors that were meeting at that time were Corey, Robison, Cahoon, Keck, Wurtelle; I can't think of the others. I did not make a personal examination of the books of the bank during the administration of Barbour. I knew about the Corey loan when it was made; I can't give you the date. After they went to the wall, the manager was requested by the directors to get what security he could for the claim. I didn't know when the \$10,000 loan was made to the canal company. I knew nothing at all of the transaction until after it was completed. I can't remember when I first learned of the transaction. I remember Kuhn saying, 'Come over to the bank; there is a loan there we want to consider.' We went over and told Robison that if there was anything be-

ing loaned where the bank would become indebted, we wanted him to fix up security for the bank. This was some time in the summer of 1893. I don't understand the bank style of bookkeeping. I was one of the executive committee after January, 1893. I did the best I could as director. The duties of the executive committee were passing upon the loans and the property, and the general management of the bank. We didn't consent to any loans after I became one of the executive committee." The witness knew of the various transactions complained of, and had confidence in the manager and cashier.

The defendant Brough was cashier, and some of his statements in his testimony are as follows: "I was nominally ³¹⁶ cashier of the Citizens' Bank. I don't consider that I performed all the duties of a cashier, because there was a manager of the bank. He performed many of the duties that a cashier would perform if there was no manager. I was not selected as manager. I was elected at a board meeting of the directors to act as cashier, on a salary. I consider that when I went into the bank I made a contract with the directors restricting my liability. They made a contract with me that I was not to be charged with responsibility or charged with passing upon securities. That contract was in writing. With it is a proposition from six of the directors asking me to become cashier. I was a member of the Cache Valley Land and Canal Company. I did not make a loan to that company. I did know of a loan being made to the company. Mr. Robison made the loan. I did not know of it until evening came, and we made up our books. I did not find that the cash was \$10,000 short. There was a copy of the note that was sent to Chicago, lying among the checks and deposit slips. The note was taken in favor of the bank. I saw the note after it came back from Chicago. Mr. Robison sent it. It was returned on the twelfth day of June. It was charged to our account on the eighth day. This was in the year 1893. Prior to the returning of the note from Chicago, no minute entry was made upon the books of the bank, because there was a copy of the note in the pouch." When the bank made its assignment, the witness became the assignee.

The evidence presented in the record is quite voluminous, and further reference, in detail, is not deemed necessary. A careful examination of all the proof impels the conclusion that at least some of the transactions of which the plaintiffs complain, are, to say the least, not ³¹⁷ such as discreet business

men ought to consummate. The overdrafts and loans to officers, the large loans to individual borrowers, in some instances without security, as shown by the evidence, are of such a character as ought to have suggested to the directors the depletion of the vaults of the bank and the working of its ruin. Some of the directors, as is indicated by their statements on the witness stand, seem to have acted upon the theory that by the appointment of executive officers in whom they had confidence and who were reputed honest, they discharged their duties as directors; that the burdens and responsibility of management and supervision were then shifted to such officers. As we have seen, such is not the law. The directors were not mere ornaments to the bank to lure public confidence. When they became directors, the law cast upon them the important duties of supervision and direction, which they could not delegate to the executive officers, and therefore the stockholders and depositors had the right to intrust the institution with their money in confidence that the directors would perform those duties. When sued for losses which resulted from careless or unlawful acts, and unfortunate transactions, they can never set up as a defense that they did not examine the books or accounts of the bank, knew nothing about the loans or discounts, were ignorant of banking business, or that they intrusted the management and supervision of the business to the executive officers in whom they had confidence. The welfare of the public and the interests of banking institutions alike forbid this.

Mr. Morawetz, in his treatise on the Law of Private Corporations, in section 554, says: "Directors are not merely bound to be honest; they must also be diligent and careful in performing the duties which they have undertaken. They cannot excuse imprudence on the ³¹⁸ ground of their ignorance or inexperience, or the honesty of their intentions, and if they commit an error of judgment through mere recklessness or want of ordinary prudence and skill, the corporation may hold them responsible for the consequences": *Marshall v. Farmers' Sav. Bank*, 85 Va. 676, 17 Am. St. Rep. 84.

We do not herein assume to determine the ultimate rights of the plaintiffs. Whether or not they will finally be able to recover for any of the transactions complained of will, perhaps, depend largely upon the question whether or not they themselves have been guilty of such acts and conduct respecting these transactions, and the management of the bank, as will prevent a recovery by them. We simply hold that the plain-

tiffs have established a prima facie case against the defendants Brough, Spencer, Murphy, Kuhn, Wells, Schramm, and Corey; and as to them the judgment of the court must be set aside, costs to abide the result of the action. As to defendants Robison, Maguire, Beeman, Perkins, and Armstrong, the judgment of nonsuit is affirmed, with costs against the plaintiffs. The cause must, therefore, be remanded to the court below with directions to proceed in accordance herewith. It is so ordered.

Baskin, J., and Cherry, D. J., concur.

CORPORATIONS—CARE REQUIRED OF DIRECTORS.—Directors of corporations are bound to exercise that degree of care which ordinarily prudent and diligent men would exercise under similar circumstances in respect to a like gratuitous employment, regard being had to the usages of business and the circumstances of each particular case: *North Hudson etc. Assn. v. Childs*, 82 Wis. 460, 33 Am. St. Rep. 57. They cannot excuse any imprudence on the ground of their ignorance or inexperience or the honesty of their intentions; and if they commit an error of judgment through mere recklessness or want of ordinary prudence or skill, the corporation may hold them responsible for the consequences: *Marshall v. Farmers' etc. Sav. Bank*, 85 Va. 676, 17 Am. St. Rep. 84. But if directors act in good faith within the limits of their powers, using proper prudence and diligence, they are not responsible for mere mistakes or errors of judgment: See extended note to *Marshall v. Farmers' etc. Sav. Bank*, 17 Am. St. Rep. 97-100.

STATE v. MANNION.

[19 UTAH, 505.]

CRIMINAL LAW—CONSTITUTIONAL RIGHTS OF ACCUSED—CONFRONTATION BY WITNESSES.—A person accused of crime has a constitutional right to be present at his trial, to be confronted by the witnesses against him, to meet his accusers face to face, to appear and defend against the accusation preferred against him in person and by counsel, to examine the witnesses, to see into the face of each while testifying against him, to hear the testimony given upon the stand, to see and be seen, and to hear and be heard under reasonable regulations, and he cannot be denied such constitutional rights because of the youth, incapacity, or unwillingness of his accuser to meet him face to face, in the presence of court and jury. Hence, an order of the trial court permitting the prosecuting or other witness to turn her back upon the accused and directing his removal to a distant part of the courtroom while the witness testifies against him, so far that he can neither hear nor see the witness, nor see the jury, because of the distance and intervening obstacles, denies the accused a constitutional right, prevents him from having a fair trial, and vitiates a verdict and judgment of conviction.

S. H. Lewis, for the appellant.

A. C. Bishop, attorney general, W. A. Lee, deputy attorney general, and R. Van Cott, for the respondent.

⁵⁰⁸ MINER, J. The defendant was convicted of the crime of an assault with intent to commit a rape upon one Anna Bell Low. It appears from the record that the prosecutrix upon whom the alleged offense was attempted was about six years old, and when she was sworn, and before giving any testimony, stated in the presence of the court and jury, as follows: "I am afraid to tell, because I am afraid of my papa," meaning the defendant. The defendant was at this time sitting with his counsel in front of the witness and jury, and the court thereupon, without further testimony or cross-examination of the witness, ordered the defendant to take a seat in the southwest corner of the courtroom, south of the entrance to the bar, and facing the judge, clerk's bench, and jury box. The prisoner's bench was one foot five inches in height, twenty-seven feet from the jury box, twenty-four feet west from the witness Low, when testifying. The first row of jurors were seated in chairs two and one-half feet high from the floor. The judge and clerk's desks were three feet in height. These were the only objects intervening between the defendant and the witness, except the judge, clerk, and reporter. Witness Low, when she testified, sat in a chair one and one-half feet high, and faced the jury, with her back to the defendant. From the place ⁵⁰⁹ where the defendant was ordered to sit during the examination of the witness he could not see all of the jurors, neither could he see the witness, nor could he hear any of her testimony when given to the jury. The defendant was represented by counsel, who then and there objected to said order of the court, on the ground that the defendant was not permitted to confront the witnesses against him, which objection was overruled, and the defendant excepted to the ruling of the court.

During all the time the witness was giving her testimony she sat upon a chair facing the jury, with her back to the defendant, as ordered by the court. After the testimony of this witness was finished, the defendant was permitted to return to his former seat, within the bar, by his counsel. The witness Low was the only witness who testified to the corpus delicti. Prior to judgment upon the verdict, the defendant, by his

counsel, moved the court to set aside the verdict, and to grant a new trial on the ground that the trial was had in the absence of the accused; that the prosecutrix was permitted to testify with her back to the defendant, so that he could not hear her testimony or see her face to face; that the defendant was not permitted to be confronted by the witnesses against him while testifying; that the testimony of the prosecutrix was permitted to go to the jury when the defendant was out of sight and hearing of the witness, to his prejudice; that the court during the trial ordered the defendant out of the presence and hearing of the prosecutrix, when she was giving her testimony against him, and that he was prejudiced by such ruling and order of the court. From the affidavit of the defendant, used on the motion for new trial, it appears: "That on said trial, one Anna Bell Low testified before the jury, on behalf of the state, and against this affiant; that before she so testified, ⁵¹⁰ the presiding judge at said trial ordered defendant from the presence of said witness, and ordered him to take a seat in a part of the courtroom away from the jury and witness; that by order of said court, said defendant took said seat and remained there until said witness had testified in the case against this defendant; that defendant, owing to his being ordered out of the presence of said witness, and away from the jury, by said court, could neither hear, nor did he hear, what said witness testified to, nor could he see the said witness while she testified as above stated, nor could he see the jury while she was so testifying; that the defendant then and there objected to the said first order of the said judge, and objected to being absent and out of the presence of said witness, which objection the court overruled, to which ruling of the court affiant excepted."

The court denied the motion, and refused to grant a new trial, to all of which the defendant excepted. Thereupon the defendant was sentenced to imprisonment in the state prison for a period of seven years. From this judgment and conviction the defendant appeals to this court.

Under the statutes of Utah, when a defendant in a criminal case is accused of a felony he must be personally present during the trial. This is a right he cannot waive. The public has an interest in the life and liberty of an accused person. That which the law requires and makes essential in the trial of persons accused of a felony cannot be dispensed with, neither by the consent of the accused, nor by his failure to object to unauthorized methods pursued by those in authority: Rev.

Stats. 1898, sec. 4811; *Hopt v. People*, 110 U. S. 574; 1 Bishop's New Criminal Procedure, secs. 271, 273; 1 Bishop's Criminal Procedure, sec. 273; Const., art. 1, sec. 12; ⁵¹¹ *Lewis v. United States*, 146 U. S. 370; *State v. Myrick*, 38 Kan. 238.

Article 1, section 12, of the state constitution provides that: "In criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witness against him."

In this case the accused had a right to appear in the case and defend in person and by counsel, and to be confronted by witnesses against him. This constitutional right was denied the accused.

Webster defines confront as follows: 1. To stand facing or in front of; to face; 2. To stand in direct opposition; to oppose; 3. To sit face to face for examination and discovery of the truth; to sit together for comparison; to compare.

Bouvier's Law Dictionary defines confrontation in criminal law to mean "the act by which a witness is brought in the presence of the accused; so that the latter may object to him, if he can, and the former may know and identify the accused, and maintain the truth in his presence. No man can be a witness unless confronted with the accused, except by consent."

In Anderson's Law Dictionary, page 226, the following definition is given: "Confront. To bring face to face. The constitutional provision that the accused shall be 'confronted with the witnesses against him,' means that the witnesses on the part of the state shall be personally present when the accused is on trial; or that they shall be examined in his presence, and be subject to cross-examination by him."

In *State v. Thomas*, 64 N. C. 74, it is said: "In all criminal prosecutions every man has a right to be ⁵¹² informed of the accusation against him, and to confront the accusers and witnesses with other witnesses. We take it that the word 'confront' does not simply secure to the accused the privilege of examining witnesses in his behalf, but is in affirmance of the rule of the common law, that in trial by jury the witnesses must be present before the jury and accused, so that he may be confronted, that is, put face to face."

In speaking of the rights of the defendant, upon a criminal trial, the court, in the case of *Brown v. State*, 38 Tex. 483, said: "The accused should not only be within the walls of the court-

house, but he should be present where the trial is conducted, that he may see and be seen, hear and be heard, under such regulations as the law established."

The doctrine now well established is, that except to documentary evidence, and dying declarations, one accused of a felony cannot be convicted except on the testimony of witnesses whom, now on the trial, or on some previous occasion, he has had the opportunity of meeting face to face and openly examining and cross-examining in the presence of the parties and the jury: 1 Bishop's New Criminal Procedure, sec. 1194.

Under the constitution and statutes of the state the accused had a right to be present at the trial, to be confronted by the witnesses against him, and to meet his accusers face to face. He also had the right to appear and defend against the accusation preferred against him in person and by counsel. He had the right not only to examine the witnesses, but to see into the face of each witness while testifying against him, and to hear the testimony given upon the stand. He had the right to see and be seen, hear and be heard, under such reasonable regulations as the law established. By our constitution ⁵¹³ it is clearly made manifest that no man shall be tried and condemned in secret and unheard. When the court ordered the defendant away from his counsel, twenty-four feet away from the witness who was testifying against him—so far away that he could not hear her testimony nor see her face because of intervening obstacles, and permitted her to turn her back to the defendant, so that he could not see her while testifying—he denied the defendant a constitutional right, and prevented him from having a fair trial.

When the witness stated, in the presence of the jury, that she was afraid to tell, because she was afraid of the defendant, the court, without further comment, or cross-examination of the witness, ordered the defendant away, out of the sight and hearing of the witness. From this order the jury might draw the inference that the court not only believed her statement, but believed the witness had good reasons for making the statement. The order was consequently prejudicial to the defendant.

In cases of this character, where the witness is young, the court should have considerable latitude in protecting the witness from the effects of improper conduct and language of parties and of counsel, but in doing so the constitutional right

of the defendant must be protected. The defendant was entitled to a trial in accordance with law. He was entitled to be confronted by witnesses of the state face to face, and he cannot be denied a constitutional right because of the youth, incapacity, or unwillingness of the witness brought against him to meet him face to face.

The presumption of innocence follows every man accused of crime until the verdict of guilty is pronounced. The presence of such a child, under such circumstances, doubtless made a strong appeal to the court for protection. ⁵¹⁴ This was natural. But it must not be forgotten that in this class of cases the "accusation was easy to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent," coming as it did from a child of six years, with no other witnesses to the act. It was proper that the defendant should have a full opportunity to see her and cross-examine the witness.

The constitutional right to be confronted by witnesses against him, and to defend in person, would be of little avail to the accused if he could be compelled to remain away, during his trial, out of the sight and hearing of the witnesses against him. The right to defend in person would be a meaningless term if the accused is required to remain so far away from the witnesses that he cannot hear the testimony, and therefore could not cross-examine them. The right of having counsel in his defense would amount to but little, if the accused is required to remain so far away from him that he cannot confer with him concerning the testimony that is given against him.

The jury had a right to know whether the witness herself knew the facts stated by her from her own knowledge and recollection, whether she was induced to make the charge through the plotting or scheming of others, or whether she was controlled and induced to make the voluntary statement that she was afraid of the defendant, by those having her under their control.

While the testimony of such a witness, if she be shown to understand the obligation of an oath, is competent, proper, and entitled to credit the same as any other, yet it must not be forgotten that a child of six years is quite as likely to be mistaken, or to repeat the statements of those controlling her, as other witnesses. While the court should protect a witness from imposition, regulate the procedure, ⁵¹⁵ and control the

conduct of the accused, within the rules of law, it should also see to it that the constitutional rights of the accused are not denied him.

We are of the opinion that the court erred in making the order complained of, and in denying the defendant's motion for a new trial.

The judgment of the district court is reversed, and the cause remanded with directions to grant a new trial.

Baskin, J., concurs.

CHIEF JUSTICE BARTCH concurred in the judgment of reversal, but not in all of the reasoning, nor entirely with the proposition of law laid down in the majority opinion. He said: "If the statements purporting to have been made by the court below contained in the attorney general's brief, as to what took place immediately preceding the order complained of, and those indicating the circumstances connected with the making of the order were in the bill of exceptions, I would dissent, but as they are not in the record, and since the record as filed in this court must be held to import absolute verity, the judgment announced seems to be a logical sequence, even though there be a miscarriage of justice, which, if the prisoner is in fact guilty, is likely to result, in case the opinion be literally complied with at the next trial.

"From the tenor of the opinion it would seem that, regardless of any circumstances, a court, in the trial of a criminal case, has no discretion whatever respecting the nearness of defendant to a witness; that he may, if he so wills, seat himself immediately in front of his victim who is on the witness stand, and remain there, even though he so intimidate the witness by his close proximity and insistent look that the witness will be unable to testify. If it were shown in the record, as intimated in the brief referred to, that repeated efforts to elicit the testimony of the witness were unsuccessful because of the manner of the defendant before the witness, then in my judgment the order complained of could not be regarded as reversible error. The court, under circumstances like these referred to, would clearly have the right, in the interests of justice, to exercise a reasonable discretion in removing the prisoner to some other place not without the presence of the witness and jury. The constitutional right of one accused of crime 'to be confronted by the witnesses against him,' was never intended as an instrument with which to defeat justice.

"Where the witnesses for the prosecution are present at the trial, are examined in the presence and within the hearing of the accused and jury, and an opportunity afforded the prisoner for cross-examination, I am of the opinion the constitutional provision is complied with, even though the prisoner be not permitted to sit immediately in front of the witness, when such position would

cause intimidation and prevent the eliciting of testimony. Doubtless the purpose of that constitutional provision is to compel the prosecution to produce its witnesses at the trial, and to prevent the admission of testimony by deposition, so as not to deprive the accused of cross-examination in his presence before the jury.

"The words 'to be confronted' manifestly have reference to cross-examination of the witness in the presence of the accused, and not to sitting face to face in a literal sense. This is manifest from the authorities: *Summons v. State*, 5 Ohio St. 325; *Howser v. Commonwealth*, 51 Pa. St. 332; *Mattox v. United States*, 156 U. S. 237, wherein it was said that, 'the primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury, in order that they may look at him, and judge by his demeanor upon the stand, and the manner in which he gives his testimony, whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of the safeguards, even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. . . . A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant.'

"So the supreme court of Iowa, in *Westfall v. Madison County*, 62 Iowa, 427, with reference to the constitutional provision that the accused shall 'be confronted with the witnesses against him,' said: 'We understand this to mean that the witnesses on the part of the state shall be personally present when the accused is on trial': *Anderson's Law Dictionary*, 226; *Commonwealth v. Richards*, 18 Pick. 434, 29 Am. Dec. 608; *United States v. Gilbert*, 25 Fed. Cas. 1313, No. 15,204; *People v. Oller*, 66 Cal. 101; *Bell v. State*, 28 Am. Rep. 429; 2 Tex. App. 216; *State v. Laxton*, 76 N. C. 216.

"I am of the opinion that a trial court has power, in the conduct of a criminal prosecution, to make such an order as is in question in this case, whenever the facts and circumstances warrant it, and that an accused has no right to insist on sitting in such a position as to intimidate a witness and defeat the ends of justice. In the conduct of a criminal, the same as in a civil jury trial, much ought necessarily be left to the good sense and judgment of the judge.

It is his duty to exercise a sound discretion in all matters appertaining to the orderly progress of the trial, and his action should not be interfered with unless there is a clear abuse of discretion."

CRIMINAL TRIAL—PRESENCE OF THE ACCUSED.—On the trial of felonies the prisoner should be present during the delivery of the testimony: Extended note to *Warren v. State*, 68 Am. Dec. 222. No principle is supposed to be better settled and more rigidly adhered to than that on the trial of felonies the prisoner has a right to be present at every stage from the arraignment to the rendition of the verdict: Extended note to *Fight v. State*, 28 Am. Dec. 630. See, too, *State v. Atkinson*, 40 S. C. 303, 42 Am. St. Rep. 877.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

CUSSEN v. BRANDT.

[97 VIRGINIA, 1.]

NEGOTIABLE INSTRUMENTS — PAYMENT — EXTINGUISHMENT.—When a person who is primarily bound for the payment of a note takes it up, it is a payment, and the note is extinguished, whatever the payer's intention may have been.

NEGOTIABLE INSTRUMENTS—PURCHASE AND NOT A PAYMENT—WHAT IS.—When a note is taken up by a stranger, who is neither a party to the paper, nor bound, in any way, for its payment, the transaction is a purchase, and not a payment, where it clearly appears from the evidence that he did not intend to satisfy or discharge the note, but to purchase it as an investment.

NEGOTIABLE INSTRUMENTS—PURCHASE OF, FROM AGENT FOR COLLECTION—TITLE—EQUITIES.—The purchaser of an overdue negotiable note, from an agent for collection, takes it subject to all the equities to which it was subject in the hands of the agent. He acquires nothing but the actual right and title of the agent.

NEGOTIABLE INSTRUMENTS—INDORSEMENT “FOR COLLECTION,” AND CANCELLATION THEREOF—EFFECT OF, ON NEGOTIABILITY.—An indorsement “for collection” destroys the negotiability of a promissory note, but a cancellation of the indorsement restores the negotiability of the note.

NEGOTIABLE INSTRUMENTS — PURCHASE FROM AGENT “FOR COLLECTION”—LEGIBLE CANCELLATION OF INDORSEMENT—NOTICE OF TITLE.—If a bank holds a negotiable promissory note for collection, a buyer of the note is charged with notice of the bank's title, where an indorsement on the note, “for collection,” has been canceled, but the indorsement is still legible through the pen marks by which it was canceled, for this is sufficient to put him upon inquiry.

NEGOTIABLE INSTRUMENTS — PURCHASE FROM AGENT “FOR COLLECTION”—NOTICE OF TITLE—PRIORITY

OF PAYMENT.—If one gives a series of negotiable promissory notes, secured by a deed of trust on real estate, payable in the order of their maturity, and two of the notes, being in the hands of a bank for collection, are purchased by a person under circumstances properly charging the buyer with notice of the bank's title, the lien of the notes so purchased is subordinate to that of a matured, unpaid note in the hands of the original owner, and the latter must be paid first, where the trust property is ordered to be sold.

Suit by Brandt and Dunlop, trustees, against Cussen and others. The defendant, Cussen, appealed from the decree.

L. L. Lewis, for the appellant.

Jackson Guy, Coke & Pickrell, John Dunlop, and B. B. Munford, for the appellees.

* BUCHANAN, J. On the fifteenth day of December, 1892, Charles H. Talbott executed a deed of trust on certain improved real estate in the city of Richmond to secure the payment of twenty negotiable notes, aggregating thirty-five thousand eight hundred dollars, drawn by Talbott, to his own order, payable at the City Bank of Richmond, and secured in the order of their maturity. The first note was payable six months from that date, and the other nineteen notes were each payable six months later than its immediate predecessor, the last or twentieth note of the series being payable ten years after date.

The notes were afterward, for value, indorsed in blank, and delivered by Talbott to William A. Marburg, of Baltimore, Maryland. The first, second, and third notes were paid as they respectively ³ matured. A few days before the fourth note, which was for \$2,690, became due, Talbott applied to Marburg to extend the time for its payment, or, if he was not willing to do that, to assign it to some one willing to purchase it. Marburg refused to sell the note, but extended the time for its payment ninety days, Talbott paying the interest and executing his negotiable note for a like sum payable at that time. Some days before the renewal note became due, it, with the original note, was sent by the National Union Bank, of Maryland, to the City Bank, of Richmond, for collection. The latter bank delivered the original note, and, as is contended by the appellant and Marburg, the renewal note also, to Elam, either as purchaser or payer. Shortly before the fifth note of the series, payable thirty months after date, became due, it was also sent to the City Bank for collection, and was de-

livered to Elam under substantially the same circumstances as those under which he acquired the \$2,690 note. The money which was paid by Elam was the full amount of both notes, and was received by Marburg.

When the sixth note of the series, which was payable in December, 1895, became due, the time for its payment was extended for four months, and upon the failure of Talbott to make payment, when the renewal note became due, the trustees in the deed of trust were required to make sale of the property.

They filed the bill in this case to have the trust executed under the direction of the court, because, as they allege, they learned for the first time when they were about to execute the trust that one Henry Grimmell held the twenty-four months note for \$2,690, having taken up the same about the time of the maturity of the ninety days renewal note, and that the thirty months note was held by J. B. Elam who had acquired it about the time of its maturity; and that they had no evidence that Marburg had assigned these notes to the parties who held them, and were demanding that the property should be sold for cash sufficient to pay them. ⁴ Talbott and wife, Marburg, Grimmell, and Elam were made parties defendant to the suit.

Elam filed his answer claiming that he had purchased the notes, and afterward transferred the twenty-four months note to Grimmell, and that he, Elam, was still the holder of the thirty months note. Grimmell answered stating that he had purchased the note held by him from Elam, and both asserted their right to have the property sold, and the notes held by them paid in their order of priority as fixed by the deed of trust.

Marburg filed his answer, denied that he had sold the notes, as claimed by Elam and Grimmell, or authorized their sale, and denied that those notes could be paid out of the proceeds of the trust property until the notes held by him were paid.

Subsequently, the appellant, Emilie Cussen, who had a large debt secured by a subsequent deed of trust upon the same property, became a party to the suit. In her answer, she asserted her claim under her deed of trust, alleged that the notes held by Elam and Grimmell had been satisfied and were no longer liens upon the property, and that she was entitled to have the trust subject sold for the payment of her debt free from the liens of these notes.

The matters involved in this appeal depend upon the question whether the notes in controversy were paid, or purchased,

by the appellee Elam when he obtained them from the City Bank. Elam and the cashier of the bank are the only witnesses as to what occurred when he acquired them. Elam's version of what took place is as follows:

"On the 11th of March, 1895, Mr. Charles Talbott came to see me, at my office, and stated that a note of his for \$2,690 was about to mature; that he was unable to pay it, and desired me to investigate the matter and inform him whether I could effect an extension thereof. He stated what the security was, giving the date of the note, and said that it was one of twenty notes secured ^{to} upon his two houses next to the corner of Second and Franklin streets; that the original transaction had been negotiated by Mr. Jackson Brandt; that the three notes prior to the said note of \$2,690 had been paid by him, and that this note of \$2,690 which he wished extended was then held by the City Bank of Richmond. I asked him whether this note was a prior lien to the notes maturing subsequently under said deed. He said that he did not remember, but thought, in any event, the security was ample, stating his estimate of the two houses, and undertaking to convince me that even if it were not a prior lien there was no doubt about the security. I stated to him that if the City Bank was the holder of the note, and if it was a prior lien upon the property, that if the notes had priority one over the other as usual, I could probably effect the extension of the note for \$2,690 for him, provided the bank was the holder and would transfer the same by delivery; and that I would investigate the matter, and inform him of the result. I then went to the office of Mr. James W. Sinton, the cashier of the City Bank, and inquired if he held the said note for \$2,690, naming the date and time, and the amount of it, stating to him that my purpose was not to pay the note but to effect an extension of it, provided, upon investigation, the security was satisfactory. He stated that he held the note, and, upon my request to look at it, he went to his vault and brought me the note referred to by Mr. Talbott. I stated to him that I would investigate the security, and, if it were found satisfactory, I would wish to take up said note for the purpose of extending it. He said that would be all right, and, in that event, I could bring my check for it. I went then to the clerk's office of the chancery court and read the deed securing said notes, and found that the notes were liens in the order of their maturity; that they were drawn by Charles H. Talbott to his own order, and indorsed by him in blank, and secured to the

holder or holders thereof, and that the property described was as represented by Mr. Talbott. I then went to see the client⁶ who had a day or two previously stated to me that he would have, within a day or two, about three thousand dollars for investment in real estate paper. I stated to him that I could probably give him a note for \$2,690, stating to him what the security was, and he consented to take it. I then took my firm's check for \$2,690, went to the office of Mr. Sinton, at the City Bank, stated to him that I had satisfied myself as to the security of said note about which I had spoken to him previously on the same day, and that I was prepared to take up said note. He brought me the note, and I handed him the check."

"Then, some three months later, Mr. Talbott called and stated that the note for \$630, which was the next note in order under said deed, was very nearly due, and that he was unable to pay it, that he would be glad if I would effect an extension of it in the same manner as I had done the other. I told him I thought I could effect an extension of that in the same manner, and accordingly, on the 17th of June, 1895, as I now remember, I went with my firm's check to Mr. Sinton's office, and said to him that I would be willing to take up and extend said note for \$630 if I might do so in the same manner in which I had taken up the former note for \$2,690; that this was one of the same series of notes secured by the same deed. He said, 'very well,' and went and brought me the note for \$630, taking my check for the same, and delivering to me the said note."

The cashier of the bank gives no connected account of what did occur. His recollection of it seems to be very imperfect, many of his statements are vague and indefinite, in some instances contradictory, and altogether his testimony is very unsatisfactory. But, in respect to the facts which are to our minds controlling in determining the character of the transaction when the bank parted with the notes, the cashier's evidence tends to sustain Elam's account of what occurred. Elam says that, when he went to the bank to inquire into the matter, and to see whether or not he would take up and extend the \$2,690 note,⁷ he told the cashier what his purpose was, and that he did not wish to pay the note. Upon this point the cashier says: "I remember absolutely, Mr. Elam's coming to me and making inquiry regarding certain Talbott notes—I do not now recall the date—and my giving him what information I could, and his statement that he did not wish to pay said

note or notes." Again when asked: "Do you or not recall that, when Mr. Elam told you that his object was not to pay said note, but to take it up and extend it, provided he found the security satisfactory upon investigation, you told him he could do so?" he answered: "I recall his stating that he wished to make certain examinations before taking up said note, and I stated that he could get the note." When asked whether or not the \$630 note (the other note in controversy) was delivered to Elam "as a paid note or as a transferred note," he replied: "We regarded it as an unpaid note." Elam states positively that the Baltimore bank's indorsements on the notes "for collection" were canceled when they were delivered to him, and that when he first went to the bank he inquired if it held the \$2,690 note, and was told that it did, but he was not informed that it held it for collection. When the cashier was asked whether, in any of his interviews with Elam in reference to the notes, he informed Elam that his bank held the notes for collection, and that it had no authority to sell or transfer them, he replied: "I have no recollection of so stating to Mr. Elam."

Whether a transaction like this is a payment or a purchase is a question of intention—of fact rather than of law—and is to be settled by the evidence: *Wood v. Guarantee etc. Co.*, 128 U. S. 416. It is undoubtedly true, as contended by counsel for appellant, that it is essential to a sale that both parties should consent to it; but it is as difficult to see how there can be a payment and an extinguishment thereby of a debt, by a stranger who is under no obligation to pay, when there is no intention to pay, as it is to see how there can be a sale without an intention to sell. This assent, however, need not be expressed, nor shown by direct ^s evidence. It may be inferred from the circumstances attending the transaction, and often is: *Ketchum v. Duncan*, 96 U. S. 659.

It appears from the record that Elam, who was neither a party to, nor under any obligation to pay, the notes, did not intend to satisfy or discharge, but to purchase them as an investment; that he informed the bank of such intention; that with full knowledge of his purpose to purchase for an investment and not to pay, it received his money, and delivered the notes to him uncanceled. These facts and circumstances show that Elam intended to purchase, and that the City Bank, of Richmond, tacitly assented to the sale. Upon no other theory can its conduct in receiving Elam's money, and delivering the

notes uncanceled, with full knowledge that he intended to purchase them as an investment and not to pay them, be explained.

The authorities hold that a transaction like that under consideration is a purchase, and not a payment. It was said by the supreme court of the United States, in a case similar to this upon the question under consideration, that "in cases like that before us, where the intention to continue the existence of the note and not to cancel it by payment is made evident, when the money is paid to the collecting agent appointed to receive it, and the owner of the note receives the amount due to him, the authorities sustain the transaction as a purchase": *Dodge v. Freedman Sav. etc. Co.*, 93 U. S. 379; *Ketchum v. Duncan*, 96 U. S. 659; *Carter v. Burr*, 113 U. S. 737; *Swope v. Leffingwell*, 72 Mo. 348; *McDonnell v. Burns*, 83 Fed. Rep. 866, 28 C. C. A. 174; *Brice's Appeal*, 95 Pa. St. 150.

The case of *Citizens' Bank v. Lay*, 80 Va. 436, which was much relied on by the appellant's counsel to sustain his contention that the notes must be considered as paid, whilst clearly right upon the facts of that case, sheds but little, if any, light upon this, because of the material difference in the facts of the two cases. In each case the party who had taken up the paper was a stranger to it, but in that case he was, by another contract, expressly and primarily bound to pay it, whilst in this case he was neither a party to the paper, nor bound in any way for its payment.

When one who is primarily bound for the payment of a note takes it up, it is a payment—an extinguishment of the note—no matter what his intention may have been: 2 *Daniel on Negotiable Instruments*, secs. 1236, 1238; *Citizens Bank v. Lay*, 80 Va. 436, 440.

The notes in question having been purchased by Elam are not extinguished, as appellant contends, but are existing liens upon the trust subject, and are entitled to priority over the deed of trust given to secure her debt. The trial court so held, and its decree upon that question must be affirmed.

Under rule 9 of this court the appellees, Elam and Grimmell, insist that the decree appealed from is erroneous in so far as it provides that Marburg shall have priority over them, and shall be first paid out of the proceeds of the trust subject, and ask that the decree in that respect be corrected. This contention we do not think can be sustained. The notes held by them respectively were purchased by Elam under circumstances

which make it equitable that their payment should be postponed until the notes held by Marburg have been paid. When Elam acquired them, one note was overdue, and held by the City Bank for collection. It had no authority to sell them, but of this Elam had no actual knowledge, but he did have notice of circumstances which were sufficient to put him upon inquiry, which inquiry would have disclosed the facts of the case. The note for \$2,690 being overdue when Elam purchased it, he acquired nothing but the actual right and title of the City Bank. He took it subject to all the equities to which it was subject in its hands: *Arents v. Commonwealth*, 18 Gratt. 750; *Davis v. Miller*, 14 Gratt. 1; 1 Daniel on Negotiable Instruments, sec. 724a.

The other note had not yet matured, but it, as well as the \$2,690 note, had upon it the restrictive indorsement of the ¹⁰ Baltimore bank canceled, according to Elam's statement, but still both indorsements were legible through the pen marks by which they were canceled. These indorsements destroyed the negotiability of the notes, and were notice to persons dealing with the City Bank that it held them for collection only. The cancellation of the indorsements changed the character of the notes, and restored their negotiability. This was a material change in the character of the notes apparent upon their face sufficient to put Elam upon inquiry (*Angle v. North Western Mut. Life Ins. Co.*, 92 U. S. 330; 1 Daniel on Negotiable Instruments, 4th ed., sec. 795), which inquiry, if pursued, would have disclosed the fact that the City Bank only held the notes for collection, and had no authority to sell them. Elam made no such inquiry, gave no notice to Marburg of his purchase, allowed him to remain under the belief that the notes had been paid, and that the security for the payment of other notes held by him thereby increased, which latter object was, no doubt, the chief reason why he refused to sell the larger note before its renewal. If, as Elam and Grimmell contend, the trust property will sell for a sum sufficient to satisfy the notes held by Marburg and themselves, then no injury will result to them except a delay of two or three years in getting their money, as the property by consent is to be sold for one-fourth cash, and the residue payable in one, two, and three years. If, on the other hand, it does not sell for a sufficient sum to pay all the notes, we do not think it would be equitable or just, under all the circumstances of the case, that Marburg should suffer loss resulting from Elam's negligence when he purchased

the notes, and the delay of the holders in asserting their claim.

We are of opinion, therefore, that there is no error in the decree complained of, and that it should be affirmed.

PAYMENT OF DEBT BY STRANGER—EFFECT OF.—The payment of a debt by one who is not a party to the contract, although made without assent of the debtor, extinguishes the debt: *Harrison v. Hicks*, 1 Port. 423, 27 Am. Dec. 638. Compare *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 45 Am. St. Rep. 872.

NEGOTIABLE INSTRUMENTS—TRANSFER—RIGHT ACQUIRED BY.—A transferee of overdue negotiable paper acquires no better right than that of his transferrer: *First Nat. Bank v. County Commrs.*, 14 Minn. 77, 100 Am. Dec. 194; *Valrin v. Hobson*, 8 La. 50, 28 Am. Dec. 125. Such paper is subject to all equities existing between the original parties: *Loewen v. Forsee*, 137 Mo. 29, 59 Am. St. Rep. 489.

NEGOTIABLE INSTRUMENTS.—AN INDORSEMENT, "FOR COLLECTION," upon a negotiable instrument, does not vest title in a collecting bank, but simply constitutes it the agent of the owner: *Notes to Midland Nat. Bank v. Brightwell*, 71 Am. St. Rep. 614; *United States Nat. Bank v. Geer*, 70 Am. St. Rep. 396; *In re State Bank*, 45 Am. St. Rep. 459; *Garden City Nat. Bank v. Fidler*, 35 Am. St. Rep. 877. Such an indorsement is a restricted one, and gives notice that the instrument is the property of the owner, and that it is no longer negotiable. Hence, one acquiring it thereafter cannot claim protection as an innocent purchaser: *People's Bank v. Jefferson etc. Sav. Bank*, 106 Ala. 524, 54 Am. St. Rep. 59.

TATE v. COMMERCIAL BUILDING ASSOCIATION.

[97 VIRGINIA, 74.]

INSURANCE—LIFE.—A BUILDING ASSOCIATION HAS NO INSURABLE INTEREST in the life of one of its members, who is not indebted to it.

INSURANCE—LIFE—CONTRACT OF, WHEN VOID AS AGAINST PUBLIC POLICY.—An agreement between a building association and a member thereof, that the latter shall insure his life for the benefit of the association, is contrary to public policy, and invalid, where the association has no insurable interest in his life.

ESTOPPEL—VOID CONTRACT CANNOT CREATE.—A contract void as against public policy cannot create an estoppel. Hence, an agreement between two persons that one of them shall make a contract with a third person for the benefit of the other, which contract would be unlawful, cannot create an estoppel to a claim against the intended beneficiary, who has received from such third person the fruits of a lawful contract substituted for that which would have been unlawful.

INSURANCE—LIFE—UNLAWFUL AGREEMENT—INSURABLE INTEREST—MEASURE OF RECOVERY.—An unlaw-

ful agreement cannot defeat a lawful right. Hence, if a building association and three of its members agree that such members shall insure their lives for the benefit of the association, the latter to pay the premiums, but the members, instead of keeping their agreement, take out the insurance for their own benefit, without the knowledge of the association, and then assign the policies to the insurance company as collateral security for a debt due to it by the association, and the insurance company, upon the death of one of such members, in whom the association had no insurable interest, pays the policy, by crediting the amount on such debt, an assignee of the rights of the insured is clothed with all of the latter's rights, and, though the variance from the agreement did not become known to the association until after the death of the insured, such assignee is entitled to recover of the association the amount of the policy, less premiums paid by it thereon, and also the amount contributed by him to enable the association, along with like contributions from other members, to pay the interest on its debt and the premiums on the policies so assigned to the insurance company. The agreement for insurance upon the life of a member in which the association has no insurable interest is contrary to public policy and invalid, but the member has a lawful right to take out insurance for his own benefit.

THE MAXIM, IN PARI DELICTO, IS NOT INFLEXIBLY APPLIED to an agreement which is not intrinsically immoral or evil, where no fraud or deception upon anyone is designed by it, and where it is condemned by the law because contrary to the interests of society; but the court will consider whether public policy will be promoted and like agreements be discouraged by enforcing or avoiding the agreement. If the policy of the law will be advanced by granting relief, it will be given.

INSURANCE—LIFE—WANT OF INSURABLE INTEREST—RETENTION OF PROCEEDS—PUBLIC POLICY.—It is contrary to public interest and against public policy to allow anyone to retain the proceeds of a policy of insurance, though voluntarily paid by the insurance company, where the insurance was effected for his benefit upon the life of another, in which he had no insurable interest, whether the policy was issued upon the life of the insured directly for such beneficiary, or for the benefit of the insured and then assigned by him to the beneficiary, as this would encourage speculation upon the chances of human life, with a direct interest in its early termination.

JUDGMENT—CONFESSION OF, BY BUILDING ASSOCIATION, FOR ANTECEDENT DEBT—EFFECT OF.—Under section 1149 of the code of Virginia, any lien or encumbrance created by the voluntary act of a company chartered by a court, for the purpose of giving a preference to one creditor over another creditor, except to secure a debt contracted or money borrowed at the time, inures to the benefit ratably of all its creditors. Hence, if a building association confesses a judgment for an antecedent debt, the lien thus voluntarily and actively created on its property will inure ratably to the benefit of all its existing creditors.

Suit brought by Tate to recover the amount of an insurance policy. He also claimed the benefit of a judgment confessed by the defendant association. Tate appealed from the decree.

Caskie & Coleman, J. H. Lewis, and J. R. Henry, for the appellant.

Lee & Howard and Harrison & Long, for the appellee.

⁷⁶ RIELY, J. In the year 1891 the Commercial Building Association, a corporation, applied to the Maryland Life Insurance Company for a loan of twelve thousand dollars, which the latter agreed to make upon certain conditions. It required that the association execute its bond for the amount of the loan, and that the same be signed by its stockholders as sureties. It also required that the association secure the bond by deed of trust on ninety-four of its lots, and, as a further security for the loan, that it insure the lives of three of its youngest members in the sum of twenty thousand dollars. The evidence establishes that the association, in compliance with this last requirement, entered into a verbal agreement with W. H. Wrenn, B. E. Hughes, and J. D. Tate, the appellant, that they take out policies of insurance upon their lives for its benefit in the Maryland Life Insurance Company, aggregating the required amount, upon which the association would pay the premiums.

The evidence further shows that Wrenn, Hughes, and Tate insured their lives for the specified sum, but that, in doing so, they did not take out the insurance for the benefit of the association, but each for his own benefit, and then assigned the policies to the insurance company, as additional collateral security for the said loan. This variance from the agreement did not become known to the association, or to any of the other members until after the death of Wrenn, when the appellant claimed to be entitled as assignee of Wrenn to the proceeds of his policy, subject, however, to the right of the insurance company under the prior assignment of the policy to it by Wrenn as collateral security for the loan to the Commercial Building Association. The insurance company paid the policy by applying its proceeds as a credit on the debt owing to it by the association.

This suit was brought by Tate to recover from the association ⁷⁷ the amount of the policy, less the indebtedness of Wrenn to it for premiums paid, upon the ground that the proceeds of the policy had been applied by the insurance company, by virtue of the assignment from Wrenn, to its debt against the association; and also to recover the amount of contributions by Tate to pay his proportionate part of assessments made

by the association against the members to meet the premiums on the policies, and the interest on the debt to the insurance company. Tate was the secretary of the association and apportioned the assessments among the members, including himself, and paid his proportionate part of them up to the death of Wrenn, but thereafter refused to do so.

When the agreement was made that Wrenn should take out the insurance on his life for the benefit of the association, he was not indebted to it as a stockholder or otherwise, and did not thereafter become indebted to it, except for the premiums paid by it on his policy. The association clearly had no insurable interest in his life.

In *Warnock v. Davis*, 104 U. S. 775, Mr. Justice Field said: "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life": See, also, *Richardson on Insurance*, sec. 27; 1 *May on Insurance*, sec. 102a; *Connecticut Mut. Life Ins. Co. v. Luchs*, 108 U. S. 498; *Roller v. Moore*, 86 Va. 512.

If the agreement had been complied with by Wrenn, and he had taken out the insurance on his life for the benefit of the association, the policy would have been invalid. The association could not have recovered from the insurance company upon the policy, certainly not beyond the premiums paid, if ⁷⁸ indeed at all. An assignee of a policy having no insurable interest in the life of the insured can only retain so much of the proceeds, where the insurance was lawfully effected, as is necessary to reimburse him for premiums paid, expenses incurred, and interest thereon: *Roller v. Moore*, 86 Va. 512; *Long v. Meriden Britannia Co.*, 94 Va. 594; *Beaty v. Downing*, 96 Va. 451; *New York Life Ins. Co. v. Davis*, 96 Va. 737. A fortiori, the association, having no insurable interest in the life of Wrenn, could not occupy any better position, if he had carried out the unlawful agreement and insured his life for its benefit instead of his own.

The agreement that the insurance should be effected by Wrenn for the benefit of the association was contrary to public

policy, and invalid. Wrenn did not keep the unlawful agreement, but took out the insurance for his own benefit, which was wholly lawful. He then assigned the policy to the insurance company as collateral security for the debt due to it by the association. Upon the death of Wrenn, the insurance company paid the policy by crediting the amount on the debt the association owed it, and for which it held the policy by assignment as collateral security. The association received and accepted the benefit of the policy. It would, therefore, have become liable to Wrenn's estate for the amount of the policy if he had not assigned it in his lifetime to Tate. The latter, as assignee of Wrenn, is clothed with all his rights. The association can make no defense against Tate that it could not have made against Wrenn. It would have had no lawful ground of complaint against Wrenn for not taking out the policy for its benefit, and can have none against Tate. An agreement between two persons that one of them shall make a contract with a third person for the benefit of the other, which contract would be unlawful, cannot constitute an estoppel to a claim against the intended beneficiary who has received from such third person the fruits of a lawful contract substituted for that which would have been unlawful. ⁷⁰ An unlawful agreement cannot defeat a lawful right. A contract which is void as being against public policy cannot create an estoppel, if, indeed, it has vitality for any purpose.

The maxim, "*In pari delicto potior est conditio defendentis*," was also invoked by the appellee to defeat a recovery by the complainant. Wrenn, as we have seen, did not carry out the unlawful agreement and insure his life for the benefit of the association, but took out the policy for his own benefit. The insurance effected was in all respects a valid contract, and he cannot be considered to be in *pari delicto*, but if he had performed the agreement and taken out the policy for the benefit of the association, the agreement was not of that kind with respect to which courts fold their hands and refuse to interfere: *Warnock v. Davis*, 104 U. S. 775.

The agreement was not intrinsically immoral or evil. No fraud or deception upon anyone was designed by the agreement. Its execution involved no moral turpitude. It was simply condemned by the law because contrary to the interests of society. In such case, the maxim, in *pari delicto*, is not inflexibly applied, but the court will consider whether public policy will be promoted and like agreements be discouraged by enforcing or

avoiding the agreement, and if the policy of the law will be advanced by granting relief, it will be given: Pomeroy's Equity Jurisprudence, secs. 403, 941; 1 Story's Equity Jurisprudence, sec. 298; *Starke v. Littlepage*, 4 Rand. 368; *Cardwell v. Kelly*, 95 Va. 570.

To allow anyone to retain the proceeds of a policy of insurance, if the insurance company chose voluntarily to pay it, which was effected for his benefit upon the life of another, in which life he had no insurable interest, whether the policy was issued upon the life of the insured directly for such beneficiary, or for the benefit of the insured and then assigned by him to the beneficiary, would encourage speculation upon the chances of human life, with a direct interest in its early termination, contrary to the public interest, and in contravention of the policy of the law. ⁸⁰ The denial of all right in the beneficiary to retain in such case more of the proceeds of the policy of insurance than is necessary to reimburse him for premiums paid and expenses incurred dissipates all hope of profit and removes the temptation to speculate in insurance upon human life.

In *Cammack v. Lewis*, 15 Wall. 643, Lewis procured, at Cammack's suggestion, a policy of insurance on his life for three thousand dollars. Cammack paid the premium, and immediately after the policy was issued, Lewis executed his note to Cammack for three thousand dollars, for which there was no consideration, and assigned the policy to him in absolute terms. Lewis at the time owed Cammack only seventy dollars. He died seven months after taking out the policy, and Cammack collected it. In an action against him by Lewis' administratrix, it was held that she was entitled to recover the proceeds of the policy, subject only to the extent of Lewis' indebtedness to Cammack, including the amount of the premium he had paid on the policy.

In *Warnock v. Davis*, 104 U. S. 775, the plaintiff's intestate, on applying for a policy of insurance on his life, entered into an agreement with a trust association, whereby the latter was to pay all fees and assessments on the policy and receive nine-tenths of the amount due thereon at the death of the insured. On receipt of the policy, he assigned it to the trust association, but reserving a one-tenth interest, which he directed should be paid to his wife. Upon the death of the insured, the association collected the policy, paid to his widow one-tenth thereof, less certain sums due under the agreement, and retained the

residue. Suit was brought against the association by the administrator of the insured to recover the residue of the money it had received on the policy. It was held, the case of *Cammack v. Lewis*, 15 Wall. 643, being cited and approved, that the plaintiff was entitled to recover from the association the money it had collected on the policy with interest thereon, less the sums advanced by it in payment of fees and assessments.

⁸¹ Tate, by the assignment, acquired the policy of Wrenn, subject to the rights of the insurance company to apply the proceeds of the policy to the debt of the association, but with the right, if so applied, to claim the amount from the association, less such sum as might be due to it for premiums paid for Wrenn on the policy. If the policy had been taken out by Wrenn directly for the benefit of the association according to the agreement, it would not have had any right to the proceeds beyond the amount of the premiums it had paid, if indeed to that extent; and it has, as is conceded, the right to claim out of the proceeds as against Tate the amount of the premiums so paid. So that Tate, in taking from Wrenn an assignment of his policy has not deprived the association of any lawful right or interest, pecuniary or otherwise. Notwithstanding any relation he may have borne to the association, he has done it no injury in acquiring Wrenn's policy. He is, therefore, entitled to recover from it the amount of the policy, subject to a deduction of the amount for premiums paid by it on the policy; and he is also entitled to recover the amount contributed by him to enable it, along with like contributions from other members, to pay the interest on its debt and the premiums on the policies assigned to the insurance company as collateral security for the said debt.

On April 15, 1896, a judgment was confessed by the Commercial Building Association in the circuit court of Lynchburg in favor of the Commercial Bank of Lynchburg for the sum of seven hundred and thirty-four dollars and ninety-four cents, and constitutes a lien on the property of the association. The issue was made by the bill that the judgment created an illegal preference in favor of one of the creditors of the association, and is within the provisions of section 1149 of the code. The evidence proves that the judgment was not for a debt contracted or money borrowed at the time of the creation of the lien, but for an antecedent debt.

Any lien or encumbrance created by the voluntary act of such company, that is, a company chartered by a court, for the

⁸² purpose of giving a preference to one creditor over another creditor, except to secure a debt contracted or money borrowed at the time, is within the provisions of the statute, and, by the express terms thereof, inures to the benefit ratably of all its creditors. A confession of judgment is not a passive but an active act on the part of the debtor. Such a company may suffer a judgment to be recovered against it by default, where it has no defense to the debt, but it cannot confess a judgment for an antecedent debt, and thus voluntarily and actively create a lien on its property, without the lien inuring ratably to the benefit of all its existing creditors. Such an act is within the spirit as well as the very letter of the statute. The judgment was confessed by the president of the association in pursuance of a resolution adopted that day by the association, and he testified that it was done "to secure the Commercial Bank in preference to securing ourselves," Tate being confessedly one of "ourselves." It follows that the lien created by the judgment confessed in favor of the Commercial Bank inures to the benefit ratably of all the creditors of the company then existing.

The decree of the circuit court must be reversed, and the cause remanded to it for further proceedings to be had therein in accordance with the views expressed in this opinion.

INSURANCE—LIFE—INSURABLE INTEREST—NECESSITY FOR.—A party insuring must have an interest in the life to be insured, when the insurance is effected for his own benefit, or the policy will be void: *Mitchell v. Union Life Ins. Co.*, 45 Me. 104, 71 Am. Dec. 529. See, also, *Clement v. Insurance Co.*, 101 Tenn. 22, 70 Am. St. Rep. 650. Public policy does not allow anyone having no insurable interest to be the owner of a policy of insurance upon the life of a human being. The public has an interest, independent of the consent and concurrence of the parties, that no inducement shall be offered to one man to take the life of another: *Note to Prudential Ins. Co. v. Jenkins*, 57 Am. St. Rep. 239.

INSURANCE—LIFE—INSURABLE INTEREST—WHAT IS.—An interest in life, to be insurable, must be an interest in favor of the continuance of the life and not an interest in its loss or destruction: *Note to Prudential Ins. Co. v. Jenkins*, 57 Am. St. Rep. 229. The interest in another's life which will support a life insurance policy must be pecuniary: See monographic note to *Morrell v. Trenton Ins. Co.*, 57 Am. Dec. 94, on the necessity of an insurable interest in the life of another: *Carpenter v. United States Life Ins. Co.*, 161 Pa. St. 9, 41 Am. St. Rep. 880, and note.

INSURANCE—LIFE—ASSIGNMENT—INSURABLE INTEREST. A life insurance policy may be assigned: *Wheeland v. Atwood*, 192 Pa. St. 237, 73 Am. St. Rep. 803; and, when it has been once issued to a beneficiary legally entitled, he may assign or transfer it to another who has no insurable interest, if done in good faith: *Clement v. Insurance Co.*, 101 Tenn. 22, 70 Am. St. Rep. 650. Com-

pare the extended note to *Equitable Life Ins. Co. v. Hazlewood*, 16 Am. St. Rep. 906-908, on the validity of an assignment of life insurance to one who has no insurable interest in the life insured; note to *Martin v. Stubbings*, 9 Am. St. Rep. 630; *Keystone etc. Ben. Assn. v. Norris*, 115 Pa. St. 446, 2 Am. St. Rep. 572. A valid policy of insurance on one's own life is assignable: *Steinback v. Diepenbrock*, 158 N. Y. 24, 70 Am. St. Rep. 424. A person has an insurable interest in his own life, and he may effect such insurance, and appoint anyone to receive the money in case of his death during the existence of the policy: *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 69 Am. St. Rep. 380.

MAXIMS—IN PARI DELICTO—HOW APPLIED.—Participants in offenses not involving moral turpitude are not always deemed equally in the wrong. The law will therefore consider their degrees of guilt and their relative delinquency, and administer justice between them: *Lowell v. Boston*, 23 Pick. 24, 34 Am. Dec. 33.

PORTSMOUTH GAS COMPANY v. SANFORD.

[97 VIRGINIA, 124.]

ATTACHMENT.—A MUNICIPAL CORPORATION MAY BE GARNISHED or attached for an ordinary debt which it owes to a third person, though he is a nonresident.

The gas company brought an action against the defendants, Sanford, Brooks & Bonsal. The action was dismissed, and the plaintiff sued out a writ of error.

Crocker & Crocker and R. C. Marshall, for the plaintiff in error.

Watts & Hatton, for the defendants in error.

¹²⁴ **BUCHANAN, J.** The plaintiff in error brought an action on the case against the defendants in error to recover damages for injuries alleged to have been done to the mains and sewer-pipes of the plaintiff. The defendants, who were contractors with the city of Portsmouth to construct a system of sewerage, were nonresidents of the state, and the city being indebted to them on that account, ¹²⁵ an attachment was sued out and levied by serving a copy thereof on the city, which was designated as owing and having estate of the defendants in its possession.

When the case, which had been regularly matured by order of publication, was called, the defendants appeared specially

and moved the court to quash the attachment on the ground that the city of Portsmouth was not liable to garnishment. The court sustained the motion, quashed the attachment, and dismissed the action. To that judgment this writ of error was awarded.

The only question involved is the right of the plaintiff to subject the debt due from the city of Portsmouth to the defendants under the provisions of our attachment law which authorizes garnishment proceedings against persons indebted to nonresident defendants.

Section 2967 of the code provides, among other things, how the estate of a nonresident defendant may be levied upon under attachment proceedings, and how any person indebted to or having in his hands effects of such defendant may be summoned as a garnishee.

The words "any person," used in that section, include corporations as well as natural persons. In *Baltimore etc. Ry. Co. v. Gallahue*, 12 Gratt. 655, 663, 65 Am. Dec. 254, it was held that when the word "person" is used in a statute, corporations as well as natural persons are included for civil purposes. This was the rule at common law: 2 Institutes, 697, 703. They are to be deemed and taken as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in such statutes.

Section 5, subsection 13, of the code provides that the word "person" may extend and be applied to bodies politic and corporate as well as individuals.

Judge Allen, in delivering the opinion of the court in *Baltimore etc. Ry. Co. v. Gallahue*, 12 Gratt. 663, 664, 65 Am. Dec. 254, said: "The general words as to what effects, debts, or estate may be ¹²⁰ attached would seem to embrace his whole estate, without respect to the character of the person, natural or artificial, in whose hands the effects were, or by whom the debt was due. The corporation stands in precisely the same position in regard to such effects or debts as a natural person. If it owes the debts or holds the effects of another, it, like an individual, is liable to be sued by its creditor or the owner of the property; and the statute merely substitutes the plaintiff in the attachment to the rights of the creditor or owner as against the garnishee. No change is made in its contract or additional obligation imposed on it by being proceeded against as a garnishee."

The reasoning of Judge Allen is applicable to all corporations, and all, it would seem, should be held to be within the statute unless there be some rule of public policy which would exclude municipal corporations.

It is well settled that the officers of the state are not liable to such proceedings without its consent: *Rollo v. Andes Ins. Co.*, 23 Gratt. 509, 14 Am. Rep. 147; 2 Wade on Attachments, sec. 346; Drake on Attachments, 7th ed., sec. 516; and it is claimed that upon similar grounds municipal corporations should not be. In the courts of many of the states this view prevails, and the reason upon which it is based is thus stated by a learned writer upon the subject: "The foundation of the doctrine that municipal corporations cannot be called upon to answer as garnishees is purely a question of public policy. They are regarded as integral branches of the government, exercising only public functions, and intended to guard public interests. To permit them to be subjected to actions, and possible judgments and expense, in relation to matters in which they have no interest, it is deemed would be an intolerable burden in view of the large number of persons who necessarily stand toward them as creditors. To turn them into mere instruments for the collection of private debts, it is thought, would detract from their dignity, and be subversive of the public interest. To place the debts owing by large cities, ¹²⁷ towns, or other municipal corporations within the reach of this facile process, it is feared, might endanger the working capacity of the government by driving away the employes upon whom its executive duties devolve, thus endangering the peace and good order of the community; and much more to the same general purport, which is not, however, universally convincing": 2 Wade on Attachments, sec. 345.

Mr. Dillon, in his work on Municipal Corporations, while conceding that the weight of authority is in favor of the non-liability of municipal corporations to garnishment, expresses the opinion that, "where the question is left entirely open by statute, on principle a municipal corporation is exempt from liability of this character with respect to its revenues and the salaries of its officers, but that where it owes an ordinary debt to a third person, the mere inconvenience of having to answer as garnishee furnishes no sufficient reason for withdrawing it from the reach of the remedies which the law gives creditors of natural persons and private corporations": 1 Dillon on Municipal Corporations, 4th ed., sec. 101.

By an act approved February 19, 1898 (Acts of Assembly 1897-98, chapter 410, page 445), express authority is given to subject the wages and salaries of the officials, clerks, and employés of a municipal corporation by garnishment where a judgment has been rendered against such official, clerk, or employé. If it be the policy of the state, as shown from this act, to make a municipal corporation liable to garnishment upon debts due its officials, there would seem to be no good reason for holding that it should not be liable to proceeding where it owes an ordinary debt to a third person, unless a contrary rule has been established in this state. We have no decision of this court upon the precise point. In the case of *Hicks v. Roanoke Brick Co.*, 94 Va. 741, it was held that a writ of fieri facias against a contractor was a lien upon the amount due him by the city of Roanoke for work done. In order to subject that fund in the hands of the city and make the lien available the execution creditor ¹²⁸ would have the right, it would seem, from the very necessity of the case, to implead the city and bring it before the court. If the city can be brought before the court in order to subject the fund in its hands to the satisfaction of the lien, there is no reason why it cannot be done by garnishment, for in that proceeding its rights can be fully protected as in any other. Besides the objection to holding municipal corporations liable to garnishment is not based upon the form of the proceeding, but upon the ground that such corporations should not be impleaded at all in controversies in which they have no interest, and where the object of bringing them before the court is merely to subject funds in their hands due to one of the litigating parties to the payment of a debt due the other.

If a municipal corporation is liable to garnishment in the ordinary case, where both the execution debtor and the garnishee are residents of the state, it is clearly so where the principal debtor is a nonresident of the state.

In that class of cases another rule of public policy is to be considered, and that is that the state owes it to its own citizens to provide appropriate remedies by which home creditors may subject the assets or effects of nonresident debtors to the payment of their debts. The general rule is, that a foreign personal representative or guardian cannot be sued out of the jurisdiction in which he qualified, because his duties are considered as strictly local, yet under special circumstances, in order to protect home creditors, the general rule gives way, and

our courts take jurisdiction of suits against them, as was done in *Tunstall v. Pollard*, 11 Leigh, 1, and in *Clendenning v. Conrad*, 91 Va. 410. The ground upon which our courts take jurisdiction in such cases is that it is the duty of every sovereignty to provide for the security of its own people. Our attachment laws against nonresident debtors having assets or effects in this state are based upon the same principle, and give creditors the right to subject such assets or effects to the payment of their debts in suits upon ¹²⁹ constructive notice in violation of the general rule that all parties sued are entitled to personal notice.

Upon the facts of this case little inconvenience and no prejudice can result to the city of Portsmouth by holding it liable to garnishment. The work undertaken by the defendants for the city has been completed; the city has retained, upon notice of the plaintiff's claim, a sum sufficient to meet its demands. The city is making no objection, so far as the record shows, to the proceedings against it. The only objection made is by the defendants, and if that objection prevails its effect will be to enable the defendants to withdraw their effects from the state and compel the plaintiff to abandon its claim, or bring suit in a foreign jurisdiction remote from the place where the cause of action arose.

We are of opinion that the city of Portsmouth is liable to garnishment, and that the judgment complained of must therefore be reversed and set aside, and the cause remanded to the circuit court for further proceedings.

ATTACHMENT—MUNICIPAL CORPORATIONS.—A few cases hold that any fund due from a city or town to a debtor is subject to attachment or garnishment: See monographic note to *Leake v. Lacey*, 51 Am. St. Rep. 114, 118, on the garnishment of municipalities. Contra, *Porter etc. Hardware Co. v. Perdue*, 105 Ala. 298, 53 Am. St. Rep. 124; *Sandwich Mfg. Co. v. Krake*, 68 Minn. 110, 61 Am. St. Rep. 395.

BRISTOL DOOR AND LUMBER COMPANY v. BRISTOL.

[97 VIRGINIA, 804.]

INJUNCTION AGAINST MUNICIPAL CORPORATIONS.—Courts of equity have jurisdiction to restrain the proceedings of municipal corporations, where those proceedings encroach upon private rights, and are productive of irreparable injury.

MUNICIPAL CORPORATIONS—POWER OF, TO ABATE NUISANCES.—The power to prevent and abate nuisances, conferred upon a city in general terms, does not authorize the extra-judicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such.

NUISANCE.—A BUILDING CANNOT BE ABATED AS A NUISANCE, when it is not the building itself, but only its use, which constitutes the nuisance.

NUISANCE.—THE DESTRUCTION OF A BUILDING, AS A NUISANCE, IS NOT JUSTIFIED on the ground that it is not kept as clean as it should be in the interest of public health; or that its use diminishes the value of surrounding property; or that the structure is unsightly; or that it is occupied, or resorted to, by lewd or disorderly persons.

Rhea & Peters, for the appellant.

Bailey, Price & Byars, J. S. Ashworth, J. W. Read and W. S. Hamilton, for the appellees.

305 HARRISON, J. At a regular meeting of the council of the city of Bristol, held February 4, 1896, a resolution was adopted declaring a certain building belonging to appellant, known as "Buffum's Stalls," to be a nuisance, and the mayor of the city directed to proceed to have the same abated as such.

On the nineteenth day of March, 1896, the mayor of the city informed the appellant in writing of the action of the council, and notified it that, unless the building in question was removed in thirty days from March 20, 1896, he would proceed to enforce the ordinance of the city, prescribing a fine of not less than one dollar, nor more than twenty dollars, for each day the building thereafter remained, and that, in addition thereto, he would have the same removed at the expense of appellant.

On the twentieth day of April, 1896, appellant applied to and obtained from the judge of the corporation court of the city of Bristol an injunction restraining the execution of the resolution of the city council, which injunction was dissolved by the decree appealed from on the fifth day of April, 1897, and the bill dismissed.

The appellant is a corporation, incorporated under the laws of Virginia, and engaged in the manufacture of doors, window sash, moldings, and other house furnishings. About two years before the institution of these proceedings, it purchased, for the purpose of conducting its business, a plant on Williams street, in the city of Bristol. This purchase included a large two-story ³⁰⁶ framed building, situated near the factory, consisting of eight tenements, all under one roof, and containing in all some forty rooms, used by the owners of the factory for occupation by its employes.

The bill charges that appellant knew nothing of the resolution of the council, and that it had no notice, of any character, that the city authorities had under consideration the matter of declaring its property a nuisance, and that there was no legal testimony before the council that its property was a nuisance. The bill further charges that said property is not a nuisance; that it in no way endangers the life or health of the citizens of the city; that its occupants are not disorderly or lewd people; that in no respect and for no reason could the same be accounted a public nuisance, and that it is valuable not only as homes for its employes, but for other purposes, such as storage rooms for lumber, etc.

The appellee demurred to this bill, and in its answer vouched the following section of its charter, defining the powers of the city council, as the authority for its action: "To require and compel the abatement of all nuisances within said city at the expense of the person or persons causing the same, or the owner or owners of the ground whereon the same shall be; to prevent and regulate slaughter-houses, soap and candle factories in said city; for the exercise of any dangerous, offensive, or unhealthy business, trade, or employment therein; and to regulate the transportation of coal and other articles through the streets of said city." The answer then alleges, as ground for the resolution complained of, "that appellant had allowed said building to become a nuisance by keeping disorderly and lewd persons therein, by permitting the same to become filthy and unsightly objects, being a constant source of annoyance to all parties residing in their vicinity, and greatly depreciating the value of surrounding property." The bill states a clear case for the intervention of a court of equity, and the demurrer thereto was properly overruled.

³⁰⁷ The facts alleged, if true, show that appellant was about to suffer, at the hands of appellee, an irreparable injury in the

destruction of its property. In such cases the law is well settled that courts of equity have jurisdiction to restrain the proceedings of municipal corporations, where those proceedings encroach upon private rights, and are productive of irreparable injury: *High on Injunctions*, ed. 1874, 463-471, tit. "Municipal Corporations"; *Yates v. Milwaukee*, 10 Wall. 497. In the case cited, the bill was filed by the appellant, Yates, to restrain the city of Milwaukee from interfering with his wharf, that had been condemned by the city as an obstruction to navigation and a nuisance, and ordered to be abated. The bill was dismissed by the lower court, and, upon appeal, the supreme court reversed the decision, and entered a decree enjoining the city from interfering with the wharf.

The exercise of the police power is indispensable to the proper government of all cities, and the safety and protection of their citizens. The limit of that power it would be difficult to define, if, indeed, it could be fixed. There is no doubt, however, that it extends to the protection of the lives, health, morals, and safety of all persons in the community. It is to secure and promote the public health, safety, and convenience that municipal corporations are so generally and so liberally endowed with power to prevent and abate nuisances. This authority, and its summary exercise, may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal notion of a nuisance; but such power conferred in general terms cannot be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such: 1 *Dillon on Municipal Corporations*, 4th ed., sec. 374; *Yates v. Milwaukee*, 10 Wall. 497. In the case last cited, Mr. Justice Miller, speaking upon this subject for the supreme court, says: "But the mere declaration by the city council of Milwaukee that a certain structure ³⁰⁸ was an encroachment or obstruction, did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general law, either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city at the uncontrolled will of the temporary local authorities." Numerous authorities of the

highest value might be cited to sustain the law as laid down by this learned judge, but it is deemed unnecessary.

The question whether or not appellant's building is such a nuisance as called for its destruction is one of the facts to be determined by the evidence. As already seen, the case stated by appellee in its answer, which is all it attempts to prove, is that disorderly and lewd persons are allowed to occupy the buildings; that they are permitted to become filthy and unsightly objects, being a constant source of annoyance to all parties residing in their vicinity, and that the value of the surrounding property is thereby depreciated.

Had these charges been established, the destruction of appellant's property would not have been justified. When a building is a nuisance only because of the uses to which it is devoted, the building itself cannot be pulled down to stop the nuisance, but only the wrongful use can be stopped: 2 Wood on Nuisances, sec. 738. Indeed, it would require a great stretch of judicial power for a court of equity to sanction the abatement of a building as a nuisance, when the building itself does not, but only its use, constitutes the nuisance. The law will only permit the abatement of so much of a nuisance as is necessary to prevent the injury. It is only necessary to be rid of the persons who use the buildings for an unlawful or improper purpose, and ^{see} the law affords ample remedies, by indictment and otherwise, to accomplish this purpose.

In 1 Dillon on Municipal Corporations, section 376, it is said: "Power to suppress bawdy-houses gives the corporation authority, by implication, to adopt by ordinance the proper means to accomplish the end. But power to the common council of a city to make all such by-laws as it may deem expedient for effectually preventing and suppressing houses of ill-fame, does not authorize the council to decide that a given house is kept for that purpose, nor, if kept for that purpose, does it authorize the council to order it to be demolished, nor if thus demolished, will it justify the officers of the city who did it, in execution of the ordinance and resolution of the council." In a case involving this question, the court of appeals of New York said: "A house kept as a house of ill-fame, and as a resort for thieves and other disreputable persons, is a public and common nuisance, but the destruction of the building and its furniture is not necessary to its abatement, and is unlawful": *Ely v. Supervisors of Niagara County*, 36 N. Y. 297.

So, when a building is not kept as clean as it should be in the interest of public health, the remedy for this wrongful use is ample, and a destruction of the building for that reason would be unlawful.

Nor can it justify the destruction of a building that its use diminishes the value of surrounding property. It is not enough that it renders other property less salable, or that it prevents one from letting his premises for as large a rent as he might otherwise do, or to as responsible or respectable tenants. Nor does the fact that a building is unsightly justify its destruction.

There are many unpleasant, and indeed offensive, things that must be borne with by the owners and occupants of estates, because, although offensive to the eye or cultivated taste, they do not trench upon any recognized legal right; and this is the case, even though the thing complained of materially lessens ^{and} the value of surrounding property. The home of the poor is often unsightly to the eye of those who are able to live in more elegant establishments, but to the humble occupant who can afford nothing better it is home: 1 Wood on Nuisances, sec. 3.

We have thus far dealt with the case of the appellee, as stated in its answer. The proof fails to sustain the case stated. The evidence in support of the answer is chiefly directed to a period of time prior to the ownership of the property in question by appellant. The weight of the evidence to be considered establishes that, since appellant became the owner of the building in question, it has been occupied by three employes at the factory of the appellant, together with their families. These employes are shown to be industrious and faithful men, constantly at work, and earning good wages. The evidence further shows that since appellant became the owner of the building it has not been kept in an unclean condition, nor has it, during that time, been occupied, or resorted to, by lewd or disorderly persons. The property is separated from all surrounding houses by streets and vacant lots. Without further commenting upon the evidence, it is sufficient to say that it satisfactorily shows that the building in question has been, in no sense, a nuisance since the ownership of the appellant.

For these reasons, the decree appealed from must be reversed, and this court will enter a decree perpetually enjoining the defendants in the court below from executing the resolution

in question of the council of the city of Bristol, directing the destruction of the building of appellant known as "Buffum's Stalls."

AN INJUNCTION AGAINST A VOID MUNICIPAL ORDINANCE should be granted, when there is no plain and adequate remedy at law, and it is necessary to prevent irreparable injury, or where the execution of the ordinance will injuriously affect private rights: Note to *Chicago v. Collins*, 67 Am. St. Rep. 232.

MUNICIPAL CORPORATIONS—POWER TO DECLARE WHAT IS A NUISANCE.—Under a general grant of power cities and towns have no power to declare that a nuisance which is clearly not one: Note to *State v. Hord*, 65 Am. St. Rep. 744; *St. Louis v. Heltzeberg* etc. *Provision Co.*, 141 Mo. 375, 64 Am. St. Rep. 516; notes to *Hurst v. Warner*, 47 Am. St. Rep. 545; *Harmison v. Lewiston*, 46 Am. St. Rep. 895.

NUISANCE—BUILDING—BUSINESS IN.—It is not lawful to destroy a building in which a nuisance is committed for the purpose of abating the nuisance, where it is not the building, but only the purpose to which it is devoted, that is objectionable: Notes to *Gray v. Ayres*, 32 Am. Dec. 111; *Fields v. Stokley*, 44 Am. Rep. 111; *Burditt v. Swenson*, 67 Am. Dec. 669.

PRICE v. WALL.

[97 VIRGINIA, 334.]

DEEDS—NECESSITY OF RECORDING.—The duty of a grantee is to promptly record the evidence of his title, and, if he fails to do so, he must bear the loss that his neglect has occasioned.

DEEDS.—AN UNRECORDED DEED IS VOID as to all creditors who, but for the deed, would have a right to subject the property conveyed to their debts, whether they were contracted before or after the date of the deed.

JUDGMENT LIEN UPON LAND, THE DEED TO WHICH IS UNRECORDED.—IF PARTIES EXCHANGE LANDS, but the grantee of one tract fails to record his deed, a judgment against his grantor, docketed between the time of delivering the deed and the date of its recordation by the grantee, is a lien upon the land given in exchange, as well as upon that received in exchange. The rights of the parties are not affected by the character of the consideration given for the deed.

Action by Wall's executor against M. S. Price, and others. There was a decree for the plaintiff and a defendant, named Price, appealed.

Hoge, Wilson & Hoge, for the appellant.

J. C. Wysor and Longley & Jordan, for the appellee.

³³⁵ HARRISON, J. The question raised by the petition for appeal in this case is whether a tract of fifty-nine acres of land is liable to the satisfaction of a judgment in favor of the appellee, and other judgments reported as liens thereon.

It appears that appellant and his wife, by deed dated September 3, 1889, conveyed, in consideration of fifteen hundred dollars, to M. S. Price a tract of land containing twenty-nine acres. This deed was recorded October 5, 1889. It further appears that on the same day, September 3, 1889, M. S. Price and wife conveyed, in consideration of nine hundred dollars, to appellant, a tract of land containing fifty-nine acres. This deed was not recorded by the grantee until January 3, 1896. The evidence shows that this was a mere exchange of lands, M. S. Price paying to appellant six hundred dollars, the difference in value between the two tracts. It further appears that appellee obtained on November 26, 1894, against M. S. Price a judgment for three thousand six hundred dollars, which was docketed December 14, 1894. In brief, the established facts are that the judgment of appellee was docketed December 14, 1894, and that the judgment debtor appeared at that time, by title of record, to be the owner of both the twenty-nine and the fifty-nine acre tracts of land, although he had, as already seen, conveyed by deed dated September 3, 1889, to appellant, the fifty-nine acre tract.

It further appears that the appellee has subjected the twenty-nine acre tract to the payment of his judgment, leaving a balance thereof unpaid, and now seeks to subject the fifty-nine acres to the satisfaction of the residue.

His right to this relief is denied by appellant, who contends that the debt upon which the judgment was obtained was contracted prior to the date of his unrecorded deed; and that section 2465 of the code provides that an unrecorded deed is void only as to subsequent creditors.

This construction of the section referred to is wholly untenable. ³³⁶ The change in the position of the word "creditors" in that section was not to effect a modification of the law, but it was made in order that the words "without notice" might more clearly refer to purchasers alone, and not to creditors as well; and in order that there might be no apparent conflict between the language of the statute and the decisions of this court previously made: *Eidson v. Huff*, 29 Gratt. 338; *March v. Chambers*, 30 Gratt. 299; *Dobyn v. Waring*, 82 Va. 159.

There has been no change in the law since the cases cited were decided. Now, as then, the statute declares an unrecorded deed void as to all creditors, who, but for the deed, would have had a right to subject the property conveyed to their debts.

It is further contended by appellant that, inasmuch as this was an exchange of land, and appellee has already subjected one of the tracts to the satisfaction of his judgment, equity will not permit him to assert his lien as to the other.

It being an exchange of land is a matter of no consequence. The rights of the parties are not affected by the character of the consideration for the unrecorded deed. So far as appellee is concerned, it is immaterial whether the consideration for the land in question was money, or its equivalent in other land. Appellant having failed to record his deed as provided by law, the land conveyed thereby is bound by the lien in question as effectually as if the judgment debtor had never parted with it.

This is the express mandate of the law, and equity has no power to afford relief without destroying the registration laws.

The law pointed out to appellant a plain and simple duty, that of promptly recording the evidence of his title. Having failed to perform that duty, he must bear the loss its neglect has occasioned.

For these reasons the decree appealed from must be affirmed.

DEEDS—NECESSITY FOR RECORDING.—Under the Illinois statute, all deeds or other instruments relating to or affecting the title to real property take effect only from and after recording, as to all subsequent purchasers without notice: *Anthony v. Wheeler*, 130 Ill. 128, 17 Am. St. Rep. 281.

DEEDS, UNRECORDED—VALIDITY OF.—An unrecorded deed is void as against a subsequent purchaser or creditor, claiming under a right derived from the grantor, unless such purchaser or creditor had notice of such prior deed: *Stevens v. Brown*, 3 Vt. 420, 23 Am. Dec. 215. An unrecorded deed is void as against creditors who bring suit more than eight months after its execution: *Withers v. Carter*, 4 Gratt. 407, 50 Am. Dec. 78. An unrecorded conveyance is, by the law of Kansas, invalid while it remains unrecorded: *Smith v. Worster*, 59 Kan. 640, 68 Am. St. Rep. 385.

JUDGMENT LIEN—UNRECORDED CONVEYANCES.—The lien of a judgment in Missouri is preferred to a prior unrecorded deed: *Reed v. Austin*, 9 Mo. 722, 45 Am. Dec. 336. A judgment is a lien on real estate which has been previously conveyed by an unrecorded deed, of which the judgment creditor did not have actual notice at the time that the judgment was entered: *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334. Compare note to *Warnock v. Harlow*, 31 Am. St. Rep. 217, 218, on the effect of judgments against the holders of unrecorded conveyances.

ROANOKE v. SHULL.

[97 VIRGINIA, 419.]

MUNICIPAL CORPORATIONS—DEFECTIVE FOOTWAY—NEGLIGENCE—ORDINARY CARE—EXPERT TESTIMONY.—In an action by an infant against a city to recover damages for an injury caused by stepping into a hole in a sidewalk or footway, it is proper not to permit a witness for the defendant to answer the question: "Could not a person, exercising ordinary care, have seen the hole in the sidewalk, and avoided stepping into it?" The question of "ordinary care" is one for the jury to pass upon in view of all the circumstances, the age of the plaintiff being one of the facts to be considered. Expert testimony upon the question is not admissible.

MUNICIPAL CORPORATIONS—DEFECTIVE FOOTWAY—LIABILITY—IMMATERIAL EVIDENCE.—The liability of a city for injuries caused by its negligence in not keeping its streets and walkways in a reasonably safe condition for the use of the public, extends to the limits of the territory embraced in its charter, and it cannot evade its liability by showing that it has laid out more streets, sidewalks, and footways for the use of the public than it can keep in a reasonably safe condition. Hence, in an action by an infant against a city to recover damages for an injury caused by stepping into a hole in a sidewalk or footway, evidence on the part of the city as to how many miles of streets it has is immaterial, and it is proper to refuse to permit a witness to answer such a question.

MUNICIPAL CORPORATIONS—DEFECTIVE FOOTWAY—LIABILITY FOR INJURY TO INFANT—PROPER INSTRUCTION.—A city is bound to keep its streets, bridges, and walkways in a reasonably safe condition for the use of the public, and, if it fails to use reasonable care in doing so, and an infant, exercising such a degree of care and caution as, under the circumstances, might be expected from one of the child's age and intelligence, is injured by reason of such failure, the city is answerable for the injury. To instruct the jury, in such a case, that the city must keep its sidewalks, etc., in a reasonably safe condition for "all persons" who use them is not objectionable, because the words "all persons" mean the public.

NEGLIGENCE—INFANTS—CONTRIBUTORY NEGLIGENCE—REBUTTING PRESUMPTION.—The law presumes that a child between seven and fourteen years of age cannot be guilty of contributory negligence. Hence, to establish that a child of that age is capable of contributory negligence, such presumption must be rebutted by evidence and circumstances establishing the maturity and capacity of the infant.

NEGLIGENCE OF PARENTS—IMPUTING TO CHILD.—The negligence of parents in allowing their child to go, unattended, upon a bridge or sidewalk in a city, where it is injured by reason of the defective condition of the footway, cannot be imputed to the infant.

NEW TRIAL—SETTING ASIDE VERDICT—EXCESSIVE DAMAGES.—An appellate court will not set aside the verdict of a jury in a suit for damages, and grant the defendant a new trial, on the ground that the verdict is excessive, and contrary to the

law and the evidence, where it can neither say that the verdict is without evidence to sustain it, nor that the evidence is insufficient to support the verdict.

Moomaw & Wood, for the plaintiff in error.

Cocke & Glasgow and Alex. J. Brand, for the defendant in error.

⁴²⁰ CARDWELL, J. Olive Virginia Shull, an infant between eleven and twelve years of age, by her next friend, instituted this action in the circuit court of the city of Roanoke to recover damages for injuries alleged to have been sustained by her in consequence of the negligence of the city of Roanoke, plaintiff in error, in not keeping its streets, footways, etc., in a reasonably safe condition.

After setting out the duties of the defendant, under its charter and the general laws of the state, to keep sound, safe, and serviceable for public use and travel all its pavements, footways, streets, bridges, and sidewalks, and particularly the sidewalk or footway on the western side of the bridge across Roanoke river, near the intersection of Virginia avenue and the Riverside boulevard, in said city, in which highway, bridge, footway, and ⁴²¹ sidewalk there was, and for a long time before, and on the day and year of the alleged injury, a certain hole or opening by a plank or board (out of which the footway, sidewalk, and bridge is constructed) removed and missing, of all which the defendant long before had notice, the declaration alleges that the defendant, well knowing the premises, although bound as aforesaid to keep said highway in good condition and repair for the use of the public and the plaintiff, disregarded its duty in the premises, and did not keep the same in good repair, but willfully, wrongfully, etc., permitted said hole to be and continue, and the same was then and there so badly, insufficiently and defectively covered or protected, that by means of the premises, and for the want of proper covering and protection to said hole or area, the plaintiff, who was passing in and along said highway, bridge, footway, street, or sidewalk, then and there, necessarily and unavoidably fell into and through said hole a great distance, to wit, thirty-five feet, to the ground below, and thereby her right leg was broken, fractured, and lacerated in two places, and she was further injured in her back, spine, shoulders, intestines, and other organs, and became sick, sore, lame, etc., and by means of the premises the plaintiff was so maimed as to be disabled for life.

A demurrer to the declaration was overruled, and issue joined on the plea of not guilty, which was tried, and a verdict rendered in favor of the plaintiff, assessing her damages at five thousand dollars, and a judgment having been rendered on the verdict, the case, on a writ of error, was brought to this court.

The demurrer to the declaration was waived in the oral argument here, and we will consider the rulings of the court below at the trial, to which exceptions were taken by the defendant, and which are relied on here, in their order.

The first is to the refusal of the court to allow defendant's witness Dyer to answer the question, "Could not a person, exercising ordinary care, have seen the hole in the sidewalk, and ⁴²² avoided stepping into it?"—counsel for defendant stating that it was intended by the question to show by the witness, who had seen the place in the sidewalk complained of, the character and danger of the defect therein. We are of opinion that the court did not err in refusing to allow the question to be answered. The question of what is "ordinary care" was one for the jury to pass upon under all the circumstances of the case, the age of the plaintiff being one of the facts to be considered. Expert testimony, which the question was intended to elicit, was not admissible, and would have been a usurpation of the functions of the jury.

Witness J. H. Wingate, the city engineer for the city of Roanoke, was asked by defendant's counsel: "How many miles of streets has the city?" To this question objection was made, and the objection sustained, and this action of the court constitutes defendant's second bill of exceptions. The object of this question, counsel for defendant stated, was to show to the jury all the circumstances that existed when they came to consider what was a reasonable time to impute notice of the defect complained of to the city of Roanoke, and also what would be a reasonable time, under all the circumstances, for the city to repair the said defect after it had notice thereof, actual or imputed. It is difficult to perceive how any answer to this question could have affected the responsibility of the city for the injury complained of. The measure of the city's liability is fixed by law. Its liability for injuries caused by its negligence in not keeping its streets and walkways in a reasonably safe condition for use of the public extends to the limits of the territory embraced in the charter of the city, and it cannot evade its liability because it has laid out more streets, sidewalks, and footways for the use of the public than it can keep in a reason-

ably safe condition. As counsel for defendant in error well observes, the law requires that a municipality shall keep its streets, etc., in a certain state of repair. If it fails so to do, and an accident happens by reason ⁴²³ of its failure to perform its duty, then it is liable for the injury so caused. It will not be permitted to say that it had so much to do it could not perform its whole duty. It was not error to refuse to permit the witness Wingate to answer the question, as any answer thereto would have been irrelevant.

Of the five instructions given to the jury at the instance of the plaintiff, the defendant insists here only upon its exceptions to the first and second. The instructions are as follows:

"1. The court instructs the jury that the defendant is bound to use reasonable care and precaution to keep and maintain its streets, bridges, and sidewalks in good and sufficient repair to render them reasonably safe for all persons passing on or over the same, and if the jury believe from the evidence that the defendant, the city of Roanoke, failed to use all reasonable care and precaution to keep its bridges and sidewalks in such repair, and that the injury complained of resulted from that cause, as charged in the declaration, and that the plaintiff sustained damage thereby, while exercising such a degree of care and caution as under the circumstances might reasonably be expected from one of her age and intelligence, then she is entitled to recover of the defendant in this suit."

"2. The court further instructs the jury that the conduct of an infant is not of necessity to be judged by the same rules which govern that of an adult; that while it is the general rule in regard to an adult, or grown person, that to entitle him or her to recover damages for an injury resulting from the fault or negligence of another, he or she must have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to its maturity and capacity wholly, and this is to be determined by the circumstances of the case, and the evidence before the jury; and the law presumes that a child between the ages of seven and fourteen years cannot be guilty of contributory negligence, and in order ⁴²⁴ to establish that a child of such age is capable of contributory negligence, such presumption must be rebutted by evidence and circumstances establishing her maturity and capacity."

The main objection urged to the first instruction is to the use of the words "all persons," where it told the jury what was the

duty of the city in keeping its streets, bridges, and sidewalks in order. It is contended that the instruction, especially in the use of the words "all persons," misled or may have misled the jury to an erroneous conclusion with reference to the duty of the city in keeping its streets, etc., in order. Had these words been omitted from the instruction, or the words "the public" been used in lieu thereof, the meaning of the instruction would have been the same. That the city was bound to keep its streets, bridges, and walkways in a reasonably safe condition for the use of the public is not, nor can it be, controverted. The instruction was entirely applicable to the case, and told the jury, in effect, that if the city failed to use reasonable care in keeping its bridge and sidewalk over which the plaintiff was passing when injured in repair, and the accident resulted from that cause, and the plaintiff sustained damage therefrom, while exercising such degree of care and caution as under the circumstances might reasonably be expected from one of her age and intelligence, then she was entitled to recover in this action. This is the law, for which no citation of authority is needed.

The only objection urged to plaintiff's second instruction is with reference to that portion of it which tells the jury that the law presumes that a person between seven and fourteen years of age cannot be guilty of contributory negligence, and that, in order to establish that a child of such age is capable of contributory negligence, such presumption must be rebutted by evidence, and circumstances establishing her maturity and capacity.

This instruction propounded the law as laid down by this ⁴²⁵ court in the case of *Trumbo v. City Street Car Co.*, 89 Va. 782, citing numerous authorities to sustain it: See, also, *Norfolk etc. Ry. Co. v. Groseclose*, 88 Va. 267, 29 Am. St. Rep. 718, and *Washington etc. Ry. Co. v. Quayle*, 95 Va. 741. We are of opinion, therefore, that the court below did not err in giving either of the plaintiff's instructions complained of.

The next assignment of error is to the refusal of the court to give defendant's instruction No. 3, which is as follows:

"The court instructs the jury that if they believe from the evidence that the sidewalk on the bridge, where the injury complained of by the plaintiff was sustained, was in a reasonably safe condition for a person of ordinary caution and prudence to have passed over, in the ordinary mode of travel at the time the plaintiff sustained the injury complained of, and that, by reason of her age and want of capacity, the plaintiff could not exercise

ordinary caution and prudence to avoid accident on the streets, sidewalks, and bridges of the city of Roanoke, and that the accident would not have occurred but for such incapacity, and that the parents of the plaintiff permitted her to go upon the sidewalk on said bridge without being accompanied by a person of ordinary caution and prudence to care for and protect her from danger, that the accident causing the injury was the result of the negligence of the parents of the plaintiff, and not the negligence of the city of Roanoke, then they must find for the defendant."

This instruction was plainly erroneous, and was rightly refused. It sought to have the court tell the jury that if the parents of the plaintiff were negligent in allowing her to go upon the bridge or sidewalk, where she was injured, such negligence of her parents was to be imputed to her. This court said, in *Norfolk etc. Ry. Co. v. Groseclose*, 88 Va. 267, 29 Am. St. Rep. 718, that this doctrine had been repudiated in this state, as in many other states of the Union, ⁴²⁰ and the contrary doctrine established, and cites a long line of authorities in support of that view of the law, among which is *Norfolk etc. R. R. Co. v. Ormby*, 27 Gratt. 455. In that case, an instruction, just the reverse of the defendant's instruction No. 3 asked in this case, was sanctioned and approved by the court. In that case the plaintiff was only two years and ten months old, and the instruction referred to told the jury that although they believed that the parents of the child did not exercise ordinary care in allowing their child to be on the street without an attendant, yet the defendant was liable; it being an action brought by the child, it was his cause of action, and he was not responsible for the negligence of his parents.

The court in the eleven instructions given at the defendant's instance, and two given *ex mero motu*, covered every phase of the law applicable to the case that the defendant could reasonably have asked. It gave all that were asked by the defendant except one, and without amendment except three, and no valid objection is urged here against the amendment of these.

The remaining assignments of error requiring our consideration, which may be considered together, are to the refusal of the court to set aside the verdict of the jury, and grant the defendant a new trial, on the ground that the verdict is excessive, and contrary to the law and the evidence. As the case was fairly submitted to the jury, but little need be said upon these assignments of error.

That the bridge through which the plaintiff fell was, at the time of the accident, and had been for a long while before, in a very bad condition, is clearly proven, and not seriously controverted. At the point of the accident, there was a hole in the sidewalk or footway one foot wide and five feet long, divided into three sections twelve inches wide by twenty inches long, by four sills, to allow for the projection of the planks on either side of the bridge, the depth to the ground beneath being thirty-five feet. That this hole had been there for more than a month ⁴²⁷ prior to the accident is the uncontradicted proof (some of the witnesses say much longer), and that the city had notice of the condition of the bridge, and of the existence of the hole through which this unfortunate child fell, while passing over the bridge with her younger brother to the opposite side of the river, is not left in doubt by the evidence. Her injuries are shown to be of a permanent and grievous character. The breaking of her leg near the thigh in two places has shortened the limb an inch and a quarter or more, attended with the wasting away of the limb. There was a total paralysis of her lower limbs for several weeks, and a partial paralysis of those limbs and her lower organs, impairing her bodily functions, continuing when the trial was had, nearly six months after her injury, and there had been no improvement in her condition during the three months previous to the trial, as testified to by her attending physician. He was asked on the witness stand as to her prospects of recovery from this paralysis, and replied, "Not very bright."

The case is clearly one in which we can neither say that the verdict is without evidence to sustain it, nor that the evidence is insufficient to support the verdict; therefore the judgment complained of must be affirmed.

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—DUTY AND LIABILITY.—A city or town must keep its bridges and sidewalks in reasonably good repair, and safe condition for ordinary travel, and, if a person is injured, without fault on his part, by its failure so to do, the city is answerable: *Russell v. Monroe*, 116 N. C. 720, 47 Am. St. Rep. 823; notes to *Blyhl v. Waterville*, 47 Am. St. Rep. 600; *O'Malley v. Parsons*, 71 Am. St. Rep. 782; *Frankfort v. Coleman*, 19 Ind. App. 368, 65 Am. St. Rep. 412; note to *Lorence v. Ellensburg*, 52 Am. St. Rep. 50. Negligence, in such cases, is presumed from injury: *Gibson v. Huntington*, 38 W. Va. 177, 45 Am. St. Rep. 853.

NEGLIGENCE OF CHILDREN.—THE RULE OF CONTRIBUTORY NEGLIGENCE is not to be applied against children as it applies against adults: See monographic note to *Barnes v. Shreve*.

port City R. R. Co., 49 Am. St. Rep. 408, on negligence in dealing with children. A child between seven and fourteen years of age is prima facie incapable of exercising judgment and discretion, but evidence may be received to show capacity: See monographic note to *Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 591, on the negligence of an infant as a bar to recovery for personal injuries. It is very generally conceded that a child under five years of age is not capable of contributory negligence, but capacity changes with age, and the question of negligence becomes one for the jury with the increase of years: Note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 410, discussing the subject; *Consolidated Traction Co. v. Scott*, 58 N. J. L. 682, 55 Am. St. Rep. 620.

NEGLECT OF PARENT IS NOT IMPUTABLE TO CHILD. In an action by an infant for damages resulting from an injury to himself by the negligence or want of care of a third party, the negligence of the parent or guardian is not to be considered or imputed to the infant: Notes to *Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 591; *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 413; *Norfolk etc. R. R. Co. v. Groseclose*, 88 Va. 267, 29 Am. St. Rep. 718; *Bottoms v. Seaboard etc. R. R. Co.*, 114 N. C. 690, 41 Am. St. Rep. 790; *Wiswell v. Doyle*, 160 Mass. 42, 39 Am. St. Rep. 451. Contra, monographic note to *Freer v. Cameron*, 55 Am. Dec. 677, on the general principles of the law of contributory negligence.

NEW TRIAL—SETTING ASIDE VERDICT AS EXCESSIVE OR CONTRARY TO EVIDENCE.—A verdict will not be set aside when authorized by evidence: *Emmerson v. Claywell*, 14 B. Mon. 18, 58 Am. Dec. 645. It will not be disturbed on appeal if there is any evidence to support it: *Gibson v. Minneapolis etc. Ry. Co.*, 55 Minn. 177, 43 Am. St. Rep. 482.

HURST v. LECKIE.

[97 VIRGINIA, 550.]

ASSIGNMENT FOR BENEFIT OF CREDITORS—WHEN FRAUDULENT.—A deed of assignment for the benefit of creditors is fraudulent, if it reserves any benefit to the grantor himself; or introduces such limitations and contingencies as will give him control over the property, or its proceeds, and enable him, in effect, to defeat the conveyance; or reserves to the grantor any power to revoke the instrument; or stipulates for the maintenance of the grantor or his family; or provides for the grantor's employment, at a fixed salary.

ASSIGNMENT FOR BENEFIT OF CREDITORS—WHEN NOT FRAUDULENT—CONDUCTING BUSINESS.—If a stock of merchandise is conveyed to a trustee by a deed of assignment for the benefit of creditors, neither a provision, in such deed, giving to the trustee discretionary power to run and operate the business for a year, if he deems it wise, in the interest of creditors, to do so, nor a provision therein empowering him to replenish the stock by cash purchases of such additional stock as will aid in keeping up the business and disposing of the other stock to a better advantage, renders the deed fraudulent per se.

ASSIGNMENT FOR BENEFIT OF CREDITORS—WHEN NOT FRAUDULENT—EMPLOYMENT OF DEBTOR AS CHIEF SALESMAN.—If a stock of merchandise is conveyed to a trustee by a deed of assignment for the benefit of creditors, with discretionary power to him to continue the business for a limited time, the fact that he, after electing to continue the business, employs the debtor, as his chief salesman, to dispose of the goods, does not invalidate the deed.

ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—RELEASE CLAUSE.—If a debtor makes a deed of assignment for the benefit of creditors and stipulates therein for a release from his debts by his creditors, he must convey his whole estate, or substantially all, and where the deed does convey the whole thereof, except that exempt by law, it is valid.

ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—WITHHOLDING PROPERTY.—If a deed of assignment to a trustee for the benefit of creditors conveys the whole of the debtor's estate, the fact that he withholds property, not exempt by law, does not invalidate the deed, although it contains a release clause, for the trustee, having the title, may recover the property not delivered.

DEEDS—ACKNOWLEDGMENT OF, MUST COMPLY WITH STATUTORY FORM.—To authorize the admission of a deed to record, its acknowledgment, and the certificate thereof, must substantially comply with the form prescribed by statute.

EVIDENCE—OMISSIONS IN ACKNOWLEDGMENT OF DEED CANNOT BE SUPPLIED BY PAROL.—As the acknowledgment of a deed, and the certificate thereof, must contain, substantially, all the requisites of the form prescribed by statute, no omission therein can be supplied by parol evidence.

ACKNOWLEDGMENT OF DEED, AND CERTIFICATE—WHEN SUFFICIENT.—If a deed is entitled to record upon being acknowledged before "a commissioner in chancery of a court of record," and, under the laws of the state, there are no such officers except commissioners in chancery of the circuit and corporation courts, which are courts of record, a deed should be admitted to record where its certificate of acknowledgment defines the territorial jurisdiction of the officer taking it to have been a city named, certifies in the body thereof that it was made before him as a commissioner in chancery for such city, and is subscribed by him as a commissioner in chancery, and where there was no circuit court at the time for such city. A commissioner in chancery, whose territorial jurisdiction was limited to that city, was plainly a commissioner in chancery of the corporation court of that city, and the certificate, therefore, shows on its face that he was a person authorized by law to take acknowledgments to deeds.

Action by Hurst & Co. and another against Leckie and another. There was a decree for the defendants and the complainants appealed.

Winborne & Batchelor, Barton & Boyd, C. B. Guyer, and G. D. Letcher, for the appellants.

F. T. Glasgow, William A. Anderson, and H. A. White, for the appellees.

⁵⁵² RIELY, J. The deed of trust from G. W. Leckie to Hugh A. White, trustee, which is the subject of this controversy, is assailed as fraudulent per se, upon the ground that certain of its provisions are incompatible with the avowed purposes of the deed, and are adequate to defeat it as a security for the payment of the debts of the grantor. The clauses of the deed, which are alleged to contain the illegal provisions, are the following:

"The said Hugh A. White, trustee, shall immediately take possession and control of all the property, real and personal and mixed, hereinbefore described, and proceed to make sale of the same, either privately or by public auction, and as a whole or in parcel or parts, as he may deem best for the creditors, and in order that the best interest of the creditors may be preserved. The trustee may, if it seems to him wise, run and operate the merchandise business of the said G. W. Leckie for the period of one year from the date of this deed, and if, at the end of that time, the indebtedness is not all paid, and it is demonstrated that a continuance of the operation of the business will be to the advantage of those creditors not yet paid, then the said trustee shall continue to operate the business for another year, unless a majority in the amount of the creditors then unpaid object, in writing, to the further operation, and upon such objection by a majority in amount of the creditors, or if it is not demonstrated that it would be to the best interest of the remaining ⁵⁵³ creditors at the end of the first year's operation to continue to operate the business, then the trustee shall proceed to sell such stock of general merchandise at public auction to the highest bidder, after giving reasonable notice of the time and place.

"The said trustee is authorized and empowered to make such purchases of additional stock for cash from the proceeds of his operation of the business as will aid in keeping up the business and disposing of the other stock to a better and more profitable advantage."

It is asserted that the foregoing clauses contain a reservation for the benefit of the grantor in providing for the continuance of the business by the trustee, and that there can be no reservation to the grantor, or to the trustee, of any right, power, or control over the subject of the deed of assignment, which is inconsistent with an absolute application of its proceeds to the payment of the debts secured. It is beyond question that to reserve any benefit to the grantor himself, or to introduce limi-

tations and contingencies such as will give him control over the property or its proceeds, so as to enable him, in effect, to defeat the conveyance, or to reserve the power to revoke it, or to stipulate for the maintenance of the grantor or his family, or for his employment at a fixed salary, will render the deed fraudulent: 2 Minor's Institutes, 4th ed., 680, and the cases there cited.

The deed in question is an absolute conveyance by the grantor of all his property to the trustee, is a complete, immediate, and unreserved dedication thereof to the payment of the creditors secured, and provides for the immediate possession and control by the trustee. It leaves no interest whatever in the property in the grantor, nor reserves to him any use, possession, or control over it, but, by its express terms, all right and title to, and possession and control of, the property are absolutely and immediately vested in the trustee. It provides not only for the immediate possession and control of all the property by the ⁵⁵⁴ trustee, but for the immediate sale thereof by him for the purpose of paying the creditors in the order that they are secured. It is only in the event that it seems to the trustee wise and advantageous to the interests of the creditors that he is authorized to continue the business. Nor is he empowered to do so for an indefinite time, but he is expressly restricted to the period of one year, unless the operation of the business for that length of time demonstrates that a continuance of the business for another year will be to the advantage of the creditors who have not then been paid. But even if that be demonstrated by the result of the operation of the business for a year, yet, upon the objection of a majority in amount of the unpaid creditors to a further continuance of the business, the trustee is required to sell the stock of merchandise by public auction to the highest bidder, after giving reasonable notice of the time and place of sale. And if the trustee should deem it wise to run and operate the business for a year, instead of making an immediate sale of the stock of merchandise, the deed contains no provision that the trustee shall employ the grantor as agent or clerk to assist him at a fixed salary, or that he should employ him at all. It is not perceived that the deed contains any reservation whatever for the benefit of the grantor. No interest or right in or to the property, or possession of or control over it or its proceeds, is reserved to him.

Nor does the law condemn as vicious and illegal the provision of the deed giving to the trustee the discretionary power to run and operate the business for a year, if he deem it wise to do so,

having in view the interests of the creditors. It is not mandatory, and does not oblige him to carry it on for a single day. He may immediately sell and convert the property into money, and apply the same to the payment of the debts in the order that they are secured. It is only if in his judgment best for the creditors that he may, in his discretion, carry on the business for a year, taking that limited and definite period to dispose of the stock to the best advantage by retailing the goods for cash in the usual course of ⁵⁵⁵ mercantile trade and business, and not sacrifice them by a forced sale by public auction. The provision would seem to be a salutary one instead of fraudulent and illegal.

It is also proper in this connection to observe that the deed requires the trustee to proceed at once to collect all debts, and from such collections, and the proceeds of the sale of the property, and out of the operations of the business, if it is operated, after paying certain charges and expenses, to pay the debts in the order of their priority.

Nor is the deed rendered fraudulent by the further provision empowering the trustee to make such purchases of additional stock for cash from the proceeds of his operation of the business as will aid in keeping up the business and disposing of the other stock to a better and more profitable advantage. It confers upon the trustee the authority to make only such purchases as will aid in keeping up the business and disposing of the other stock more advantageously. The language of the provision shows clearly that the purchases of additional stock were to be only ancillary to the winding up of the business. The power to replenish the stock for this purpose is not illegal: *Marks v. Hill*, 15 Gratt. 400; *Williams v. Lord*, 75 Va. 390.

The trustee is not empowered to incur any debt in making such purchases. The deed does not authorize him to borrow money with which to make the purchases, nor to buy on credit. He is restricted to purchases for cash received from the operation of the business. Buying for cash and selling for cash, which he was required to do by the express terms of the deed, he was not given a power to defeat the security for creditors provided by the assignment by risking the casualties of trade. It is not perceived how the honest and prudent exercise of the power could so result. The deed in question differs very materially from those pronounced to be fraudulent and void in *Lang v. Lee*, 3 Rand. 410, *Sheppards v. Turpin*, 3 Gratt. 373, and *Catt v. Knabe Mfg. Co.*, 93 Va. 736, which were the an-

thorities mainly relied ⁵⁵⁶ upon by the learned counsel for the appellants to show its invalidity. It is free from their provisions, which were incompatible with the avowed object of the respective grantors to furnish an indemnity to their creditors, and destructive of the security provided.

In *Lang v. Lee*, 3 Rand. 410, the deed provided that the stock of goods should remain in the possession of the grantor, reserved to him the power to make sales of them, but to account to the trustee, if called upon, and authorized him to pay off the debts secured by installments, allowing him nearly a year to do so. The grantor, while affecting by the deed to devote the goods to the payment of debts, retained for ten months the possession, the use, and the power of selling every article thereof, to whom, in what manner, and on what terms he pleased, but to account, if called upon. These powers were incompatible with the avowed purpose of the deed. The only effect of the assignment was to mask the property. As was said by Judge Carr in that case, we cannot "imagine a power more completely adequate to the destruction of the avowed purpose of the deed than that retained by the grantor."

In *Sheppards v. Turpin*, 3 Gratt. 373, the deed conveyed the whole estate of the debtor avowedly for the purpose of securing all his creditors, yet reserved to him the right to retain possession of all the property for three years; also, the right to carry on his business as a brickmaker to any extent that he and his trustees might think proper; empowered him to borrow money from the trustees, and they to advance to him any sums they in their judgment should deem sufficient for the prosecution of the business; authorized the trustees to become his sureties upon all contracts for the hire of laborers he might make; and if, at any time after such loans or advancements were made, the trustees should deem his conduct injudicious or unthrifty, they were given the power to sell the trust property, if necessary to pay such loans and advancements, and to discharge the contracts for laborers upon ⁵⁵⁷ which they might have become sureties. In the right reserved to the grantor to carry on the business for three years was implied the power to sell the stock in trade on hand and conveyed, without any provision in the deed securing the application of the profits of the business during the three years or such time as he retained the possession and carried on the business under the provisions of the deed, or of the profits or proceeds arising from such transactions as might be based upon the contemplated advance-

ments by the trustees, to the payment of the debts secured. Judge Daniel truly said: "Under the power to make the loans provided for in the deed, the property might, at the expiration of the three years, have stood charged with sums sufficient to consume it, to the entire exclusion of all the creditors assenting to the deed."

In *Catt v. Knabe Mfg. Co.*, 93 Va. 736, the deed of trust was declared to be illegal, because it required the trustee to conduct the school known as the Wesleyan Female Institute for a period of eighteen months, and to that end authorized him to employ tutors and such other agents as he might deem necessary, and pay them a reasonable compensation for their services out of the trust funds, and made their salaries and the "running expenses" of conducting the school a primary charge upon the corpus of the trust funds and superior to the rights of the creditors. It was therefore pronounced fraudulent per se and void, because it subjected the corpus of the trust to the hazard of the unsuccessful operation of the school, and made the operating expenses and liabilities prior in right to the creditors in the distribution of the proceeds of the trust subject.

Very different are those cases from that at bar. The incompatible and destructive provisions which rendered the deeds in those cases invalid are absent from the deed of assignment in this case. Here the possession and control of the property conveyed is not retained by the debtor, nor the right reserved by him to continue the business and sell and dispose of the stock of goods ⁵⁵⁸ as he might think proper, with only the personal liability to account to the trustee, if called upon, as in *Lang v. Lee*, 3 Rand. 410; nor is there the retention of possession by the debtor for three years, and a reservation in him of the right to carry on the business, to sell the stock in trade on hand, or to borrow money to operate the business, and the liabilities so incurred in the operation of the business, made a preferred charge upon the trust subject, thereby subjecting it to the casualties of trade, as in *Sheppards v. Turpin*, 3 Gratt. 373; nor an express and positive requirement that the trustee shall continue the business for a definite period, whether or not he deemed it judicious to do so in the interest of the creditors secured, or it proved to be advantageous to their interests, and the creditors subordinated in the distribution of the proceeds of the trust fund to the liabilities incurred in the conduct of the business by the trustee, as in *Catt v. Knabe Mfg.*

Co., 93 Va. 736; but an absolute conveyance, and unreserved dedication of all the estate of the debtor to the payment of his debts, and the investment of the trustee with the immediate possession and entire control of the property, and the power to sell the same at once privately or publicly, as a whole or otherwise, with the superadded discretionary power, if he should deem it wise, having solely in view the interests of the creditors secured, to carry on the business for one year, and to replenish the stock with such purchases as would enable him the more readily to dispose of the stock of merchandise conveyed, as ancillary to its advantageous conversion into cash, and the winding up of the trust. The business was not to be conducted for the profit and benefit of the debtor, but wholly with the view to the largest realization of the trust subject, and the greatest advantage of the creditors.

In *Marks v. Hill*, 15 Gratt. 400, it was held that a power in a deed of trust to secure creditors to the trustee to continue the business and replenish the stock, if merely intended as a means of realizing the trust fund, and with a view to the winding up of the business, as is plainly apparent was the object of these ⁵⁵⁹ provisions in the case at bar, did not render it fraudulent per se, and avoid the deed. It is not possible to read the deed in this case, and not see that all its provisions were solely intended to realize the greatest amount from the trust subject for the payment of the creditors, and were not designed to benefit the debtor. The same principle was affirmed in *Williams v. Lord*, 75 Va. 401: See, also, *Catt v. Knabe Mfg. Co.*, 93 Va. 740.

The fact that the trustee elected to carry on the business for the limited period prescribed by the deed did not invalidate it. The right to do so, if in his judgment wise, was clearly conferred upon him, and, as seen above, such a provision is not illegal.

Nor does the further fact that the trustee employed the debtor as his chief salesman to dispose of the stock of merchandise do so. The deed of trust imposed on the trustee no obligation to employ the debtor, in the event that he should deem it wise to "run and operate the merchandise business," but simply authorized him to employ agents to aid him in disposing of the stock. The deed of trust in *James v. Whitbread*, 9 Eng. L. & Eq. 431, and also in *Coate v. Williams*, 9 Eng. L. & Eq. 481, expressly authorized the trustee to employ the grantor in winding up the trust, and in carrying on the business, if

thought expedient by the trustee, and to allow him such sum for his services as the trustee might think proper, but did not specify the salary or compensation to be paid. The deeds were sustained in both cases. These cases were cited with approval by this court in *Marks v. Hill*, 15 Gratt. 400, where a provision in a deed of trust that the trustee, with the consent in writing of certain of the creditors secured, should permit a particular one of the grantors to carry on the mercantile business, the stock whereof was assigned by the deed, and to replenish the same, was held not to avoid the deed. Our conclusion is, that the deed, the validity of which is the subject of this controversy, is not fraudulent per se, and should not for that reason be declared void.

⁵⁰⁰ A further objection was made to the deed that, while it stipulated for a release of the debtor from his debts, he did not deliver up all his estate to the trustee, it being charged that he withheld certain accounts on his books which, he asserted, he had transferred to his mother to pay a debt he owed her, but had not done so.

It is settled law that where a debtor stipulates in his deed of assignment for a release from his debts by his creditors, he must convey his whole estate. He cannot convey a part only to pay his creditors, and keep back a part for himself. He is imperatively required, where he stipulates for his release, to convey all, or substantially all, of his estate, or all of substantial value: *Long v. Meriden Britannia Co.*, 94 Va. 594, and the numerous authorities there referred to and discussed.

In the case under consideration, the debtor granted and conveyed to the trustee for the payment of his debts his entire estate. By the express terms of his deed, he conveyed everything and omitted nothing, except what is allowed to poor debtors, and exempted by law from subjection to the payment of debts: Code, secs. 3650, 3655. He granted and conveyed all his estate—his land, personal property, choses in action, and all other estate of every kind, species, and description. A deed of this character, although it stipulates for a release of the debtor by his creditors, under numerous decisions of this court, is entirely valid: *Long v. Meriden Britannia Co.*, 94 Va. 594; *Skipwith v. Cunningham*, 8 Leigh, 271, 31 Am. Dec. 642; *Kevan v. Branch*, 1 Gratt. 274; *Phippen v. Durham*, 8 Gratt. 457; *Wickham v. Martin*, 13 Gratt. 427; *Gordon v. Cannon*, 18 Gratt. 387; *Robinson v. Mays*, 76 Va. 708; *Paul v. Baugh*, 85 Va. 955.

If the debtor failed to turn over or to deliver up to the trustee, in pursuance of the terms of the deed, any property of any kind, except that embraced in the exemption in favor of poor debtors, that fact would not invalidate the deed of assignment. The title to all the property was absolutely vested in the trustee by the ⁵⁶¹ conveyance, with the right to take immediate possession thereof for the purposes of the deed, and he could recover from the debtor or other person any that might be withheld from him.

A still further objection was made to the deed, as an impediment to the subjection by the appellants to the payment of their debts of the property conveyed by it, that the certificate of acknowledgment does not show that the deed was duly acknowledged for admission to record, and, consequently, that its recordation was invalid to affect creditors with notice thereof. The specific objection made to the acknowledgment is that it purports to have been made before a commissioner in chancery, and that the certificate of acknowledgment does not show that it was made before a commissioner in chancery of a court of record, nor that he was a commissioner in chancery of any court. The caption of the certificate is: "State of Virginia, City of Buena Vista, to wit." It is then certified: "I, T. F. Amole, a commissioner in chancery for the city aforesaid, in the state of Virginia, do certify that G. W. Leckie and E. M. Leckie, whose names are signed to the writing hereto annexed, bearing date on the 30th day of August, 1897, have acknowledged the same before me in my city aforesaid." The certificate then concludes, and is subscribed as follows: "Given under my hand this 30th day of August, 1897. T. F. Amole, Commissioner in Chancery."

The statute (Code, sec. 2501) requires that a deed shall be admitted to record upon a certificate of acknowledgment thereof before certain officers, among whom is specified a commissioner in chancery of a court of record, and prescribes the form of the certificate. The acknowledgment must be according to the prescribed form, and the certificate thereof, in that form or to that effect, be written upon or annexed to the deed to authorize its admission to record. It must contain all the requisites of such form, and no omission can be supplied by parol evidence: *First Nat. Bank of Harrisonburg v. Paul*, 75 Va. 594, 40 Am. Rep. 740; *Virginia Coal etc. Co. v. Roberson*, 88 Va. 116; *Hockman v. ⁵⁶² McClanahan*,

87 Va. 33; *Harkins v. Forsyth*, 11 Leigh, 301; *Hairston v. Randolphs*, 12 Leigh, 445.

It has been held by high authority that if the certificate of acknowledgment does not show the official character of the person who took the acknowledgment, it may be proved by parol evidence, but it appears that this was where the form of the certificate had not been prescribed: 1 *Devlin on Deeds*, sec. 502; *Van Ness v. Bank of United States*, 13 Pet. 17; *Rhoades v. Selin*, 4 Wash. C. C. 718; *Byer v. Etnyre*, 2 Gill, 150, 41 Am. Dec. 410; *Shults v. Moore*, 1 McLean, 520; *Russ v. Wingate*, 30 Miss. 440.

It was also held by this court in *Harvey v. Borden*, 2 Wash. (Va.) 156, *Ware v. Cary*, 2 Call, 263, and *Langhorne v. Hobson*, 4 Leigh, 224, that it was not essential that the official character of the persons taking the acknowledgment should appear in the certificate, but that it would be presumed that the acknowledgment was made before officers authorized to take it. These cases, however, arose before the enactment of the statute prescribing the form of the certificate of acknowledgment, which had the effect to change the law in this respect: Acts 1813, c. 10, sec. 2, p. 35; 1 Rev. Code 1819, p. 363.

The certificate of acknowledgment to the deed in question certifies in the body thereof that the acknowledgment was made before T. F. Amole, a commissioner in chancery, and it is also subscribed by him as such officer. This description of his official character implies *ex vi termini* that he was a commissioner in chancery of a court of record, for, under the laws of this state, there are no such officers except commissioners in chancery of the circuit and corporation courts, which are courts of record.

The said certificate also defines the territorial jurisdiction of the officer to be "the city of Buena Vista," and shows necessarily that he was a commissioner in chancery of the corporation court of the city of Buena Vista, for there was not up to that time a circuit court for that city: Acts 1897-98, p. 895. A commissioner ⁵⁰³ in chancery, whose territorial jurisdiction was limited to that city, was plainly a commissioner in chancery of the corporation court of that city, for the territorial jurisdiction of a commissioner in chancery of the circuit court of Rockbridge county would be the said county, and not the corporate limits of a city within it.

The certificate of acknowledgment, therefore, certifies in substance that T. F. Amole was a commissioner in chancery

of the corporation court for the city of Buena Vista. It describes his official character, and shows on its face that he was a person authorized by law to take acknowledgments to deeds. It complies substantially with the requirements of the statute, which is all that is necessary. A strict or literal compliance is not required. Acknowledgments of deeds, either from convenience or necessity, are frequently made before and certified by inexperienced or illiterate persons, and to require that certificates of acknowledgments shall conform literally to the prescribed form would jeopardize titles to lands, and might sacrifice valuable rights depending upon them. A substantial compliance with all the material requirements of the statute as to the acknowledgment of the deed and the form of the certificate is all that is necessary. If words equivalent to those in the statute are used, it is sufficient. This is the result of our own decisions, and also the general current of the authorities: *Hockman v. McClanahan*, 87 Va. 33; *Virginia Coal etc. Co. v. Roberson*, 88 Va. 116; *Hairston v. Randolphs*, 12 Leigh, 445; *Langhorne v. Hobson*, 4 Leigh, 224; *Tod v. Baylor*, 4 Leigh, 498; *Siter v. McClanahan*, 2 Gratt. 293. See, also, 1 *Devlin on Deeds*, secs. 508, 510; *Livingston v. Kettelle*, 1 Gilm. 116, 41 Am. Dec. 166, and note thereto; *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 113; *Russ v. Wingate*, 30 Miss. 440; *Kelly v. Calhoun*, 95 U. S. 710; *Carpenter v. Dexter*, 8 Wall. 513; *Summer v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106.

All the important objections to the validity of the deed have been now considered, except that it was also attacked as fraudulent ⁵⁰⁴ in fact. It is not deemed necessary, nor would it be profitable, to burden or prolong the opinion with a discussion of the evidence upon this point. It must suffice to say that it does not sustain the charge.

The decree of the corporation court must be affirmed.

ASSIGNMENT FOR BENEFIT OF CREDITORS—WHEN VOID.—A court may declare an assignment for the benefit of creditors void, when it contains any reservation of interest, advantage, or benefit to the assignor inconsistent with the object of the conveyance: *Baldwin v. Peet*, 22 Tex. 708, 75 Am. Dec. 806; monographic note to *Bank of Little Rock v. Frank*, 58 Am. St. Rep. 78, on when an assignment for the benefit of creditors is deemed fraudulent, and the effect of the fraud on the assignment.

ASSIGNMENT FOR BENEFIT OF CREDITORS—WHEN VALID.—A bona fide assignment for the benefit of all creditors is good, when it conveys all of the debtor's property, and contravenes no express provision of the insolvent laws: *Malcolm v. Hall*,

9 Gill, 177, 52 Am. Dec. 688. A debtor may convey his property in trust to pay his creditors in full, or in unequal portions, provided he relinquishes all control over it, stipulates for no benefit for himself or family, and fairly appropriates it to the payment of his debts: *Gazzam v. Poyntz*, 4 Ala. 374, 37 Am. Dec. 745. A direction to the assignee to dispose of the property to the best advantage in his discretion, is valid: *Note to Brahmstadt v. McWhirter*, 31 Am. Rep. 398, but see note to *Nicholson v. Leavitt*, 57 Am. Dec. 505.

ASSIGNMENT FOR BENEFIT OF CREDITORS—CONVEYANCE OF WHOLE PROPERTY—WITHHOLDING PROPERTY—EXACTING RELEASE.—A deed of assignment for the benefit of creditors must show on its face that all of the debtor's property is included in the assignment: *Note to Turnipseed v. Schaefer*, 2 Am. St. Rep. 24. A reservation of property by the debtor invalidates his assignment, particularly where the grantor exacts a release from creditors: *Note to Turnipseed v. Schaefer*, 2 Am. St. Rep. 24. But the fact that an assignor has withheld a part of the assigned property will not invalidate the assignment, because the title to the property passes to the assignee: *Note to Moody v. Carroll*, 10 Am. St. Rep. 739. Compare the note to *Bank of Little Rock v. Frank*, 58 Am. St. Rep. 81, 85.

ACKNOWLEDGMENT OF DEED—SUFFICIENCY OF.—It is the policy of the law to uphold certificates of acknowledgment: *Summer v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106; but there must be a substantial compliance with all statutory requirements. Such a compliance, however, as to the acknowledgment and the form of the certificate, is all that is necessary: See monographic note to *Livingston v. Kettelle*, 41 Am. Dec. 168, 169, on when acknowledgments of deeds are fatally defective and when not. A certificate of acknowledgment must be held sufficient, when it shows, either alone, or aided by the instrument acknowledged, that the acknowledgment was made before or taken by any officer authorized by law to do so: *Summer v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106.

EVIDENCE—SUPPLYING DEFECTS IN ACKNOWLEDGMENT.—PAROL EVIDENCE is inadmissible to supply defects in a certificate of acknowledgment, except in cases of fraud, collusion, or forgery: *Barnet v. Barnet*, 15 Serg. & R. 72, 16 Am. Dec. 516; *Cox v. Holcomb*, 87 Ala. 589, 18 Am. St. Rep. 79; *First Nat. Bank v. Paul*, 75 Va. 594, 40 Am. Rep. 740; note to *Jordan v. Corey*, 53 Am. Dec. 520.

ROWE v. HARDY.

[97 VIRGINIA, 674.]

SHERIFFS.—A RETURN ON A WRIT OR PROCESS is the short official statement of the officer, indorsed thereon, of what he has done in obedience to the mandate of the writ, or why he has done nothing.

SHERIFFS—RETURN—SUFFICIENCY OF.—A return, by a sheriff, on a writ or process, of any fact showing why, without fault or negligence on his part, he has been prevented from complying with the mandate of the writ, is, when indorsed upon the writ or process, a sufficient return.

EXECUTION—RIGHT TO CONTROL.—In executing a writ of fieri facias, the sheriff is the agent of the plaintiff, who is entitled to its proceeds. Hence, the plaintiff and his attorneys have the right to control the execution and to say whether the officer shall levy it or return it without doing so.

EXECUTION—RETURN WITHOUT DATE—PRESUMPTION.—A return without date, made on an execution, is presumed to have been made while the sheriff had the right to make it, and in due time.

EXECUTION.—THE FAILURE TO RETURN A WRIT OF FIERI FACIAS ON THE RETURN DAY does not destroy the legal effect of the return indorsed upon it. The record is not complete until the writ is returned, but when a proper return of the writ is made, though after the return day, such return is thenceforth competent evidence of the facts therein stated.

EXECUTION—CONCLUSIVENESS OF RETURN.—A sufficient return upon an execution is conclusive between the parties.

EXECUTION—COMPELLING OFFICER TO MAKE RETURN.—Neither of the parties to a suit can be deprived of the benefit of a return, on a writ of execution, by the officer's neglect or failure to return the writ by the return day, and, if he fails to do so, he may be compelled, by process of contempt, or by a proceeding subjecting him to forfeitures and penalties, to make a return upon the writ and to return it.

INTEREST—ABATEMENT OF—WHEN NOT ALLOWABLE.—After judgment has been obtained for a debt, both principal and interest, it is too late to raise the question of an abatement of interest.

Appeal from two decrees of a circuit court wherein the appellee, Hardy's administrator, proved his debt against the appellant, Rowe's administrator.

H. R. Pollard and W. W. Woodward, for the appellant.

J. B. Donovan, for the appellee.

675 **RIELY, J.** It is asserted that the court erred in not holding that the judgment of the appellee was barred by the statute of limitations. The plea of the statute was based upon

the contention that more than ten years had elapsed since the date of the judgment, without an execution having been issued upon it on which there was a valid return by an officer.

The judgment was obtained in the circuit court of Gloucester county at its October term, 1869, and a writ of fieri facias issued upon it on November 24, 1869, returnable to February rules 1870. It went into the hands of the sheriff of Gloucester county on December 20, 1869, and while in his hands it was indorsed by the attorneys for the plaintiff as follows: "The sheriff is hereby directed to return this execution without levying it, January 3, 1870. Donovan & Page, p. q." In pursuance of this order, it was indorsed by the officer as follows: "Return this execution by order of the attorney for the plaintiff. J. C. Rowe, ^{etc} D. for J. L. Waterman, S. G. C."; and on March 19, 1870, it was filed in the clerk's office from which it issued.

By sections 12 and 13, chapter 186, of the code of 1860 a judgment is barred after the lapse of "ten years from the return day of an execution on which there is no return by an officer," but a scire facias or action may be brought "within twenty years from the return day of an execution on which there is such return."

In the account of debts ordered by the court to be taken in this cause by one of its commissioners, the judgment in controversy, subject to certain credits, was reported as a debt against the estate of the intestate of the appellant by the commissioner on November 10, 1886, which was less than twenty years from the return day of the execution issued upon it, and also less than twenty years (about seventeen years) from the date of the judgment.

It is objected that the statutory bar to the judgment is ten and not twenty years, because the return indorsed on the execution by the officer is not such a return to keep alive the judgment as is contemplated by the statute, but that the officer should have returned whether the money was or could not be made, or if there were only part thereof which was or could not be made, he should have returned the amount of such part. This, however, is not the only sufficient return which the officer can make. His return may also be of the existence of such a state of facts as, without fault or negligence on his part, prevented a compliance with the mandate of the writ. A return on a writ or process is the short official statement of the officer indorsed thereon of what he has done in obedience to

the mandate of the writ, or why he has done nothing. He may have been prevented from obeying the mandate of the writ by an injunction, or by a supersedeas, or by the order of the plaintiff or his attorney directing him to hold it up, or to return it to the clerk's office without levying it. A return of any of these facts, indorsed ⁶⁷⁷ upon the writ, is a sufficient return: 3 Blackstone's Commentaries, 273; 2 Bouvier's Law Dictionary, 919; Freeman on Executions, secs. 355, 356; Herman on Executions, sec. 237; McKenney v. Waller, 1 Leigh, 434; State v. Bulkeley, 61 Conn. 363; McCrory v. Chaffin, 1 Swan, 307; Eaken v. Boyd, 5 Sneed, 206; Union Bank v. Barnes, 10 Humph. 244; State v. McDonald, 9 Humph. 606; Patton v. Marr, 44 N. C. 377.

In the case at bar, the order of the attorneys for the plaintiff to the sheriff, to return the execution without levying it, was indorsed by them on the writ shortly after it came to the hands of the officer, and relieved him from the duty of levying the execution and making the money. In executing the writ, the sheriff was the agent of the plaintiff, who was entitled to its proceeds, and he and his attorneys had the right to control the execution and to say whether the officer should levy it or return it without doing so: Crocker on Sheriffs, sec. 412; Freeman on Executions, secs. 108, 368; Levy v. Abbott, 19 L. J., N. S., 62; State v. McDonald, 9 Humph. 606; Jackson v. Anderson, 4 Wend. 480; Walters v. Sykes, 22 Wend. 568; State v. Boyd, 63 Ind. 428; Humphrey v. Hitt, 6 Gratt. 509, 52 Am. Dec. 133; Walker v. Commonwealth, 18 Gratt. 13, 98 Am. Dec. 631.

In *Hamilton v. McConkey*, 83 Va. 533, the execution was returned thus indorsed: "Not levied by reason of the stay law"; and the return was held to be sufficient. In that case, the statute in question was construed, and the decision is conclusive against the objection of the insufficiency of the return. The court there said: "But whether the return is true or false, sufficient or insufficient, is not a question which can arise under the statute in question. The statute does not prescribe concerning a true or sufficient return, but concerning a 'return of an officer.' . . . But it provides that the limitation, where there is a return by an officer, shall be twenty years; and if the return of the officer is indorsed on the execution, it brings the same within ⁶⁷⁸ the meaning of the twelfth section of chapter 186 of the code of 1860."

The revision of the statute law made by the code of 1887 now defines the character of the return which will prevent the bar

of the statute for twenty years from the return day thereof, and prescribes that "any return by an officer on an execution showing that the same has not been satisfied, shall be a sufficient return within the meaning" of the statute: Code 1887, sec. 3577.

The return of the sheriff on the execution in this case bears no date, and the execution was not filed in the clerk's office from which it issued until March 19, 1870, which was after the return day. It was argued that the return, to be valid and to have the effect of keeping the judgment alive, must have been indorsed on the execution by the sheriff on or before the return day, and the execution returned by him to the clerk's office on or before that day, and that if the return was thereafter indorsed on the execution, or the execution thereafter returned to the clerk's office, the return had "no legal effect," and was "inadequate to enlarge the limitation from ten to twenty years, and, as a consequence, the judgment was not enforceable after October, 1879."

The presumption of law is, until the contrary is proved, that the officer has performed his duty (1 Greenleaf on Evidence, sec. 40; Freeman on Executions, sec. 355; O'Bannon v. Saunders, 24 Gratt. 138; Hartwell v. Root, 19 Johns. 345, 10 Am. Dec. 232; Maury v. Cooper, 3 J. J. Marsh. 224; Egery v. Buchanan, 5 Cal. 53), and it is, therefore, to be presumed, in the absence of evidence to the contrary, that the return on the execution in this cause, being without date, was made while the sheriff had the right to make it, and in due time.

As to the other part of the objection that the execution was not returned and filed in the clerk's office until after the return day, the failure to return it on the return day did not destroy the legal effect of the return indorsed upon it. All that can be said is that the record of the execution was not complete until the execution, with the return thereon of the officer, was deposited by him in the clerk's office, and that the return upon the execution did not become a matter of record and competent evidence as such until the execution was so returned. But when deposited by the sheriff in the clerk's office from which it issued, the return of the sheriff, being such as he was authorized to make, completed the record of the execution, and became thenceforth competent record evidence of the facts stated in the return, although the execution was not filed in the clerk's office until after the return day thereof: 1 Greenleaf on Evidence, sec. 521; Crocker on Sheriffs, secs. 40, 43, 45; Freeman

on Executions, sec. 353; Herman on Executions, sec. 241; Whitmore v. Rooke, Sayers, 299; Gyfford v. Woodgate, 11 East, 297; Pigot v. Davis, 3 Hawks, 25; Hardy v. Gascoignes, 6 Port. 447; Welsh v. Joy, 13 Pick. 477; Nelson v. Cook, 19 Ill. 440; Davis v. Clements, 2 N. H. 390; Remington v. Linthicum, 14 Pet. 84.

It is the duty of a sheriff or other ministerial officer to return all writs on the return day thereof with a short account in writing indorsed by him thereon of the manner in which he has executed the same, or why he has done nothing. A return upon an execution, which is sufficient in law—that is, a return which the officer had the right to make—is conclusive between the parties, and they are interested to have the officer perform his full duty, to make his return and file the writ with its proper custodian. Neither of the parties can be deprived of the return by his neglect or failure to return the writ by the return day, and the court in which the judgment was obtained, upon which the execution issued, may, if the writ be not returned in due time, award a rule against the officer to return it, and if he do not obey the rule, compel him to make his return upon the writ and to return it by attaching and fining him for contempt: 2 Bouvier's Law Dictionary, 919; Crocker on Sheriffs, sec. 40; State v. Bulkeley, 61 Conn. 363; People v. Everest, 4 Hill, 71.

⁹⁹⁰ The failure of an officer to make due return on and of any process subjects him to a forfeiture of twenty dollars; and provision is also made in case of continued failure for further forfeitures and fines: Code 1860, c. 49, secs. 27, 28; Code 1887, secs. 900, 901.

And it is made the official duty of the clerk, from whose office the process issued, if it be not returned on the return day, to issue a rule against the officer, returnable to the next succeeding term of the court, to appear and show cause why he should not be fined for his said default: Code 1887, sec. 900.

Why these provisions to force the return of process, if nothing is to be gained, no good purpose to be served? Why power in the court to oblige the officer to do so, if it is uselessly exerted? Why subject him to forfeitures and penalties to compel him to make return upon the writ and to return it, if the return, when it is made and the writ is returned, however sufficient in law the return may be, is a mere nullity and without legal effect, only because it was not made and the writ returned on the return day? The answer is, that the return on the writ

is not null, but that when made and the writ returned, it completes the record of the writ, becomes competent record evidence of the facts returned, and the parties are entitled to the benefit of their legal effect.

It is next asserted that the court erred in not holding that the debt was paid. The debt, as stated above, is due by judgment, and is a matter of record. The burden of establishing payments and proving that there was no longer any balance due upon it devolved upon the administrators of the debtor. Credit was allowed for all payments of which they produced any evidence. At their instance, the commissioner required the administrator of the creditor and his attorney to produce before him all books and papers in their possession or under their control showing the amounts that had been paid on account of the debt, or a certified statement ^{and} thereof from the books. They did so, and furnished, among other credits, some for which no receipts were produced. All payments that were acknowledged, or of which there was any evidence, were allowed. There is no evidence that any payment was made for which credit was not allowed by the commissioner. His statement of the debt and report of the balance found to be due on the judgment, with the exception of an abatement of interest for the three years that the creditor was within the lines of the Federal army, was approved by the court and a decree entered for its payment. The decree accords with the evidence, and is proper and right.

The debtor died in May, 1885, and only a few months before his death made two payments on account of the judgment, to wit, the sum of two hundred and sixty-five dollars on January 9, 1885, and one hundred dollars on March 7, 1885, which was an admission on his part that up to that time the judgment had not been discharged: *Updike v. Lane*, 78 Va. 132; *Cole v. Ballard*, 78 Va. 139.

The exception to the report of the commissioner abating interest for three years during the war, because the creditor was for that period within the lines of the Federal army, was properly sustained. Judgment had been obtained for the debt, both principal and interest, and there was no power to abate any part of the interest any more than there would have been to abate a part of the principal. The matter had passed into judgment, and it was too late to raise the question of an abatement of the interest: *Ratcliffe v. Anderson*, 31 Gratt. 105, 31

Am. Rep. 716; Robert v. Cocke, 28 Gratt. 207; Marpole v. Cather, 78 Va. 239.

Cross-error was assigned by the appellee to the allowance of two credits on the judgment of one hundred dollars each, one on January 5, 1883, and the other on March 7, 1885. They are sustained by the evidence, and were properly allowed.

The decree of the circuit court must be affirmed.

EXECUTION—CONTROL OF.—As the plaintiff is the person who is most interested in the writ, the sheriff should generally heed his instructions, and permit him to have substantial control of the writ: See extended note to McDonald v. Neilson, 14 Am. Dec. 457.

EXECUTION—RETURN OF SHERIFF—CONCLUSIVENESS OF.—A sheriff's return, regular on its face, is conclusive upon the parties to the suit and their privies: Note to Stewart v. Duncan, 28 Am. St. Rep. 368.

EXECUTION.—AN OFFICER'S CONTROL OVER HIS RETURN lasts as long as the writ remains in his hands: Dixon v. White Sewing Machine Co., 128 Pa. St. 397, 15 Am. St. Rep. 683.

THE PRESUMPTION IS THAT OFFICERS have performed their official duty: Note to Hogue v. Corbit, 47 Am. St. Rep. 238.

SHERIFFS—COMPELLING RETURN.—A defendant, as well as a plaintiff, may proceed against a negligent officer, by rule and attachment, to compel him to return an execution in due time: See monographic note to Sloan v. Case, 25 Am. Dec. 571, discussing the subject.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

CHEHALIS COUNTY v. HUTCHESON.

[21 WASHINGTON, 82.]

ESTOPPEL—COUNTY IS NOT ESTOPPED BY THE UN-AUTHORIZED ACTS OF ITS AGENTS.—If a board of county commissioners agrees with the county superintendent of schools to pay him a certain amount for each school visited, and audits and allows a claim for such services, when it is without authority to make such a contract, because restricted by the constitution, and when it has no authority to audit and allow such claim because the statute directing its allowance is invalid, the county is not estopped, by such unauthorized acts of its agents, from questioning the validity of county warrants issued in payment of the claim.

J. A. Hutcheson, for the appellant.

W. H. Abel, prosecuting attorney, for the respondent.

REAVIS, J. Action by Chehalis county to enjoin the payment of county warrants issued to appellant as county superintendent in payment for visiting county schools. Appellant was superintendent of the county schools of the county from January, 1893, to January, 1897, and during that time filed itemized claims for which the warrants in question were issued, claiming three dollars for each school visited, and mileage at the rate of ten cents per mile for each mile necessarily traveled in making such visits. There is no controversy here with reference to mileage. The claims were regularly allowed by the board of county commissioners and warrants issued thereon by the auditor. The complaint alleges that the warrants, so far as based on the visits, were void, and prays to have them adjudged void and canceled. A demurrer to the

complaint was overruled and the answer set up that the visits were made and the distance traveled at great expense, as charged ⁸⁴ in the respective claims; set up that the county embraced a large area of heavily timbered country, traversed by many rivers; that the roads were poor, and that it was very expensive traveling; and also that the board of county commissioners had represented to appellant that he would be paid the three dollars for each school visited; that it had been the custom of the commissioners to allow such payment to the county superintendent and allow such claims from time to time, and that appellant, relying on the provisions of the law then in force and the representations of the board of commissioners and of like boards throughout the state, made the visits to the schools of his county as often as necessary. The superior court adjudged the warrants which are unpaid, in so far as they are based on charges of three dollars for each school visited, to be void and canceled.

In the case of *Cox v. Holmes*, 14 Wash. 255, decided in March, 1896, it was determined that, under article 11, section 8, of the constitution, providing that the legislature shall fix the compensation by salaries of all county officers except certain enumerated ones, the provisions contained in the Laws of 1890, page 361, section 17, providing that the county superintendent shall receive compensation at the rate of three dollars for each school visited, are invalid. But the main contention of appellant here is that, though the statute directing the allowance by the county board of three dollars for each school visited was invalid, because in conflict with the constitution, yet the county board having agreed before the services were performed to make such allowance, and having thereafter duly audited and allowed appellant's claim, the subsequent decision that the statute was unconstitutional should not affect the validity of his warrants, and contends that the county is estopped from questioning their validity. Authorities are cited approving the principle that, when ⁸⁵ contracts are made by individuals under an invalid law, the subsequent declaration of its invalidity will not change the relation of the parties under the contract, and that an estoppel arises in favor of the one claiming rights under such contract, and that, where such contracts are performed, the subsequent declaration of the invalidity of the statute will not affect the parties to them; and this is undoubtedly the rule. But a different question is presented here. If there is an original lack of authority upon the part of the board of

county commissioners to make an agreement to pay for visiting schools, then such contract is void *ab initio*; and likewise if there existed no power on the part of the board to allow appellant's claim of three dollars for each school visited, it is void, and the county is not estopped. The ground of this rule is that the acts of its officers are unauthorized and void, and that one dealing with them is bound to take notice of the extent of their powers. In 2 Herman on Estoppel, page 1365, it is observed: "The true principle in such cases is well settled that one cannot do indirectly what cannot be done directly, and, where there is no power or authority vested by law in officers or agents, no void act of theirs can be cured by aid of the doctrine of estoppel. Where there is power, and it is irregularly exercised, or there are defects and omissions in exercising the authority conferred by law, the doctrine of equitable estoppel may well be applied by courts."

In the case at bar, the board of county commissioners, the agents of the county, were without authority, because restricted by the constitution, to make a contract with appellant to pay him three dollars for each school that he visited. The same want of authority existed to audit and allow a claim for such services under the invalid statute; and under well-settled principles, from which the court ⁸⁸ cannot depart, the county is not estopped by the unauthorized acts of its agents.

The judgment of the superior court is therefore affirmed.

Dunbar, Fullerton, and Anders, JJ., concur.

ESTOPPEL—MUNICIPAL CORPORATIONS.—That the doctrine of estoppel has been extended to municipal corporations, see *Hutchinson etc. R. R. Co. v. Board of Commrs.*, 48 Kan. 70, 80 Am. St. Rep. 273. Compare *Weston v. Syracuse*, 158 N. Y. 274, 70 Am. St. Rep. 472, where a city was held not to be estopped, by the conduct of its officers, from denying the validity of a resolution passed by the city council.

LANE v. SPOKANE FALLS & NORTHERN RAILWAY CO.

[21 WASHINGTON, 119.]

TRIAL—POWER TO ORDER PERSONAL EXAMINATION.—In a civil action to recover damages for an injury to the person, the court has power, on application of the defendant, to order that the plaintiff be examined by medical experts, appointed by the court, for the purpose of ascertaining the nature, character, and extent of the plaintiff's injuries, and may enforce such order by staying the trial or dismissing the case.

NEGLIGENCE—USE OF CARE—WHEN A QUESTION OF FACT.—In an action for personal injuries, the question as to whether the defendant used proper care is one of fact for the jury, where, under the evidence, it is not free from doubt.

WITNESSES—PHYSICIANS—PRIVILEGED COMMUNICATIONS—RIGHT TO EXCLUSION OF TESTIMONY WITHOUT COMMENT.—In an action for personal injuries physicians who examined the plaintiff, at his instance, in a professional capacity to determine the extent of his injuries should not be permitted, against the plaintiff's objection, to testify as to any information acquired on such examination; and the plaintiff is entitled to have such testimony excluded without its being made the subject of comment before the jury.

NEGLIGENCE, CONTRIBUTORY—STANDING IN AISLE OF CAR.—A passenger on a railway train, injured by an engine bumping forcibly against cars, is not, as a matter of law, guilty of contributory negligence because he was standing in the aisle of a coach at the time of the collision.

Action brought by Mary E. Lane against the defendant company, which appealed from a denial of its application for an order.

Will H. Thompson and Albert Allen, for the appellant.

Fenton & O'Brien, James E. Fenton, and F. C. Robertson, for the respondent.

¹¹⁰ GORDON, C. J. Respondent was a passenger on appellant's ¹²⁰ train between Spokane in the state of Washington and Rossland, British Columbia, and sued to recover damages for injuries alleged to have been sustained while such passenger, as a result of appellant's negligence. In the lower court, prior to the commencement of the trial, defendant made an application for an order directing that the plaintiff be examined by medical experts appointed by the court, for the purpose of ascertaining the nature, character, and extent of plaintiff's injuries. The court denied the application, and the main question for determination upon this appeal is whether the courts of this state have the power to compel one who sues

to recover damages for injuries to his person to submit to such an examination. The question is a very important one and is presented for the first time in this court. Upon the question the courts of the country are not agreed. In Iowa, Nebraska, Kansas, Wisconsin, Alabama, Arkansas, Ohio, Michigan, Georgia, Minnesota, and Missouri it has been held that the court possesses the inherent power to make such an order: *Schroeder v. Chicago etc. Ry. Co.*, 47 Iowa, 375; *Stuart v. Havens*, 17 Neb. 211; *Sioux City etc. R. R. Co. v. Finlayson*, 16 Neb. 579, 49 Am. Rep. 724; *Atchison etc. R. R. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659; *White v. Milwaukee etc. Ry. Co.*, 61 Wis. 536, 50 Am. Rep. 154; *Alabama etc. R. R. Co. v. Hill*, 90 Ala. 71, 24 Am. St. Rep. 764; *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584; *Miami etc. Tp. Co. v. Baily*, 37 Ohio St. 104; *Graves v. Battle Creek*, 95 Mich. 266, 35 Am. St. Rep. 561; *Richmond etc. R. R. Co. v. Childress*, 82 Ga. 719, 14 Am. St. Rep. 189; *Hatfield v. St. Paul etc. Ry. Co.*, 33 Minn. 130, 53 Am. Rep. 14; *Owens v. Kansas City etc. R. R. Co.*, 95 Mo. 169, 6 Am. St. Rep. 39.

While in Illinois, New York, Indiana, and the United States supreme court the power is denied: *Peoria etc. Ry. Co. v. Rice*, 144 Ill. 227; *Roberts v. Ogdensburgh etc. R. R. Co.*, 29 Hun, 154; *Pennsylvania* ¹²¹ *Co. v. Newmeyer*, 129 Ind. 401; *Union Pac. R. R. Co. v. Botsford*, 141 U. S. 250.

It is said that it is abhorrent to the principles of liberty to compel a party to submit to such an examination; that it invades the inviolability of the person, is an indignity involving an assault and a trespass, and an impertinence to which a modest woman would not consent. Courts should not sacrifice justice to notions of delicacy, and knowledge of the truth is essential to justice. The attainment of justice in the courts is of far greater importance than any merely personal consideration. A witness is frequently required to answer questions which shock modesty and offend the sense of delicacy. The demands of justice not infrequently occasion private inconvenience and annoyance.

"Her delicacy and refinement of feeling, though, of course, entitling her to the most considerate and tender treatment consistent with the rights of others, cannot be permitted to stand between the defendant and a legitimate defense against her claim of a large sum of money. When it becomes a question of possible violence to the refined and delicate feelings of the plaintiff on the one hand and possible injustice to the defend-

ant on the other, the law cannot hesitate; justice must be done": Alabama etc. R. R. Co. v. Hill, 90 Ala. 71, 24 Am. St. Rep. 764.

In the case at bar the respondent is a voluntary actor. She brings the suit and, as said by the supreme court of Georgia in Richmond etc. R. R. Co. v. Childress, 82 Ga. 719, 14 Am. St. Rep. 189: "When a person appeals to the sovereign for justice, he impliedly consents to the doing of justice to the other party, and impliedly agrees in advance to make any disclosure which is necessary to be made in order that justice may be done."

It is to be presumed that, in exercising this power, the trial court will always see that only proper physicians or ¹²³ surgeons—and, where possible, wholly disinterested ones—are appointed to conduct the examination, and the expense of such examination should be borne by the party requesting it. Care should be exercised to avoid all unnecessary inconvenience and annoyance to the plaintiff, and, when desired, it should be made in the presence of the counsel and friends of the party to be examined, and the trial court must be free to exercise that sound discretion which the nature of the case and the ends of justice may require. In the present case, we think the application was seasonable and a proper one, and we perceive no reason why it should have been denied, unless, as asserted by appellant's counsel, the trial court was of the opinion that it had no power to make the order. If such was the reason for refusing the order, then it is apparent that the court exercised no discretion, and the case affords no ground for our refusal to review its action. Such an order, when granted, will operate to stay the suit until its provisions are complied with. As is said by Justices Brewer and Brown, dissenting in Union Pac. Ry. Co. v. Botsford, 141 U. S. 250: "It is not necessary, nor is it claimed, that the court has power to fine and imprison for disobedience of such an order. Disobedience to it is not a matter of contempt. It is an order like those requiring security for costs. The court never fines or imprisons for disobedience thereof. It simply dismisses the case, or stays the trial until the security is given."

Authority of courts of divorce to compel a party to submit to a physical examination by physicians or surgeons appointed by the court has never been doubted: Le Barron v. Le Barron, 35 Vt. 365; Devanbagh v. Devanbagh, 5 Paige, 554, 28 Am. Dec. 443.

But it is said by the majority in *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, that the reason for the exercise of such an authority in divorce actions is "the interest which the ¹²³ public as well as the parties have in upholding or dissolving the marriage state." But will it be said that the public has no interest in the attainment of justice between individuals? The admission that the court has power to make the order whenever it is deemed requisite to ascertain the fact of incapacity in a divorce action seems to us an argument in favor of the existence of the power to make such an order in the present case. It exists by implication, and may be exercised in either case, whenever the demands of justice require it. Actions of this character have, in recent years, become so numerous that the question is of far greater importance than it could possibly have been twenty-five years ago, and it is not surprising that most of the cases in which the question has arisen or is discussed at all are of recent origin. In our state, counties, cities, and other municipal corporations are liable for negligence resulting in injury to the person, to the same extent as private corporations and individuals: *Kirtley v. Spokane County*, 20 Wash. 111; *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847; and it becomes of the utmost importance that the question be determined with due regard for the public welfare.

"The common law grew with society, not ahead of it. As society became more complex, and new demands were made upon the law by reason of new circumstances, the courts originally, in England, out of the storehouse of reason and good sense, declared the 'common law.' But since courts have had an existence in America, they have never hesitated to take upon themselves the responsibility of saying what is the common law, notwithstanding current English decisions, especially upon questions involving new conditions. . . . And we understand . . . that where there are no governing provisions of the written laws, the courts . . . of this state are, in all matters coming before them, to endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the ¹²⁴ common law": *Sayward v. Carlson*, 1 Wash. 29, 40, 41.

In concluding upon this question we adopt and indorse the view expressed in the dissenting opinion in *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, "that a party who voluntarily comes into court alleging personal injuries, and demanding damages therefor, should permit disinterested witnesses to see the na-

ture and extent of those injuries in order that the jury may be informed thereof by other than the plaintiff and his friends; and that compliance with such an order may be enforced by staying the trial, or dismissing the case."

The conclusion we have reached upon this question disposes of the appeal, but, in view of the new trial which must occur, we deem it necessary to notice other questions which may arise thereon.

From the evidence in the case it appears that when the train upon which plaintiff was a passenger arrived at the town of Northport, a distance of one hundred and forty miles from Spokane, the engine was uncoupled and taken by the fireman up the track a short distance, for the purpose of getting water, the engineer leaving the engine to get his dinner. It appears that at that point time and opportunity are afforded passengers to procure dinner before proceeding on the journey. In backing the engine down to connect it with the train, it was permitted to collide with the cars with such force as to throw the plaintiff, who was standing in the aisle of one of the coaches, to the floor, causing the injuries of which she complains. At the trial the defendant introduced witnesses, who testified that the engine was a standard locomotive passenger engine and in first-class condition; that it had been inspected at Spokane prior to going out with the train in question; that it was equipped with all modern appliances for starting and stopping; that the fireman who was on the engine at the time of the accident was a competent engineer as well as fireman, and ¹²⁵ had had some experience in running a switch-engine; that from the water-tank to where the coaches were standing the engine was permitted to drift, on a down grade, at a rate of from five to ten miles an hour; that when within the usual, proper, and a sufficient distance from the cars to enable the engine to be slowed down for the coupling, the fireman applied the air-brakes; that, they proving insufficient under the ordinary application of air, the full volume of air, or what is termed the "emergency pressure," was turned on, and that, too, proving ineffectual to stop or impede the engine, he thereupon reversed, but was unable to stop the engine in time to prevent the collision which occurred. An examination disclosed that a nut or pin in the connecting rod had broken or dropped out, rendering it impossible to apply the air-brakes and appellant contends that the collision was the result of unavoidable accident. Upon this theory, the appellant asked for an instruction

directing a verdict in its favor, and assigns as error the court's refusal to give it.

In support of this assignment, it is contended that a railroad is not an insurer of the safety of its passengers, which may be conceded; that it owes simply the duty of exercising the utmost care, skill, prudence, and foresight in the conduct of its business, which may also be accepted as the measure of its duty in this regard. It also insists that the evidence which was introduced upon its own part, and uncontradicted, shows that prior to, and at the time of, the accident it had used, and was using, such care, skill, prudence, and foresight. But concerning this question we think the court could not, as a matter of law, assume that the conditions claimed by the appellant were established by the evidence introduced. It was for the jury to say whether or not the inspection was sufficient and adequate; whether or not the fireman was a suitable and competent person to have the conduct and management of the engine ¹²⁶ under such circumstances; whether or not it was negligence for the engineer to leave the engine intrusted to the care of the fireman under such circumstances; whether or not, if the fireman had been a competent engineer, he would have been equal to the emergency which presented itself when it became apparent that the brakes were not in working order, and could have stopped the engine and prevented the collision. Then, too, witness Luce, who was conductor of the train and a witness for appellant, says that he saw the engine approaching to make the coupling; that at that time he was standing between the engine and waiting-room on the platform, ten or fifteen feet from the engine. The train consisted of a baggage-car and three coaches. The brakes were set on the train up to the time the engine was coupled on.

"I saw this engine as it approached for the purpose of making the coupling; this was a few minutes before the departure of the Nelson train. I saw the coupling when it was made and saw the engine as it approached the train for the purpose of making the coupling. Mr. Choat [the fireman] was operating the engine at the time. As he backed down to couple on he was coming a little faster than he should have been, of course, to make the coupling, and I heard him try to set the brake—that is, I heard the air escape as it does always in applying the brake—about probably two hundred feet and possibly two hundred and fifty before they came to the car, and he got along about fifty or one hundred feet farther, and I

heard him apply the air again, and very soon after that, almost immediately, I heard him apply the air full force, which is called the emergency, and yet she didn't slack up as he intended, I suppose, she should, and he struck the head end of the baggage-car. I didn't see him reverse the engine, but I know she was reversed when she struck, as she immediately started forward."

Upon the testimony of this witness, the jury might have considered that the engine was permitted to approach the ¹²⁷ train at a greater rate of speed than prudence justified.

We think the evidence made a case for the jury, and the instruction was properly denied.

There was no error committed in the giving of instruction No. 6, which withdrew from the jury certain items of damage which were abandoned at the trial, and the computation made by the court was correct, under the pleadings.

Nor did the court err in refusing defendant's requests for instructions numbered 1 and 2. It appears that Drs. Russell and Catterson had been consulted by plaintiff in their professional capacity as physicians, and had made physical examinations of the plaintiff, for the purpose of determining her injuries. At the trial the defendant called them as witnesses, and, upon plaintiff's objection, the court refused to permit them to testify to any information acquired on such examinations. By instructions 1 and 2, which were refused, the court was asked to tell the jury in effect that they might infer from plaintiff's refusal to consent to the doctors testifying that their testimony, if given, would have been unfavorable to plaintiff's cause. We think the defendant was not entitled to have these instructions given. The court correctly ruled that these gentlemen could not, without plaintiff's permission, give testimony as to any information obtained in their professional capacity, and, if the plaintiff had the legal right to have this testimony excluded, she could exercise that right without making it the subject of comment for the jury.

We think that the question raised by the assignment of error based upon the refusal of the court to give instruction No. 3, as requested, becomes unimportant by reason of our conclusion in regard to the power of the court to order an examination in a proper case.

Assignments numbered 9 and 10 are based upon a ¹²⁸ refusal of the court to tell the jury, as a matter of law, that the respondent was guilty of contributory negligence because

she was standing in the aisle of the car at the time the collision occurred. We think that to have given these instructions would have been gross error: *Railroad Co. v. Pollard*, 22 Wall. 341; *Carroll v. Burleigh*, 15 Wash. 208; *Redford v. Spokane Street Ry. Co.*, 15 Wash. 419; *McQuillan v. Seattle*, 10 Wash. 464, 45 Am. St. Rep. 799.

Because of the error above pointed out, the judgment is reversed and the cause remanded for further proceedings in conformity herewith.

Dunbar and Anders, JJ., concur.

REAVIS, J., dissenting. This cause is reversed upon a single assignment of error; that is, the refusal of the superior court to make an order directing that the plaintiff be examined by medical experts appointed by the court for the purpose of ascertaining the nature, character, and extent of her injuries. As observed in the opinion, the question is one of great importance. It can be confidently asserted that until this time no court in this state has ever assumed the power to direct the surgical examination of a party to a civil action. The proposition affirmed is that the court has the power to compel the plaintiff, in an action for personal injuries, to submit to an assault and indignity to her person, under penalty of the dismissal of her action in case of her refusal. The fixed rules of the common law are as controlling on the courts as is the statute law of the state. It is true these principles frequently require an extension of their application to new facts and conditions, and the court is then authorized to make such extension or prolongation of these rules to such new condition or fact. But established and ancient rights at the common law, which have been adopted by our legislation, cannot ¹²⁰ be altered or invaded without legislative sanction. The inquiry here would fairly seem to be, What was the controlling rule at common law in the production of testimony in actions for personal injuries?

All the authorities produced by counsel for the defendant, and mentioned in the opinion of the court, may be examined, and it will be found that no case asserts that such rule existed at common law. And, further, no case has been found, in the judgment of a common-law court, until 1868, first reported in 1877, sustaining in the court such power to order an examination of the person. The case of *Schroeder v. Chicago*

etc. Ry. Co., 47 Iowa, 375, is the strongest case, and the only one unlimited in its expressions, supporting the doctrine. It was decided in December, 1877. In that case, before the jury was impaneled, application was made by the defendant that the plaintiff be required to submit to an examination by physicians and surgeons, that they might determine the true condition of his health and the character and extent of his injuries. The application requested that such examination be made by physicians to be selected in equal numbers by plaintiff and defendant; and the affidavit of a physician was made that such examination was necessary and would determine that the injuries were not of the extent and character claimed by the plaintiff. The trial court ruled that it had no authority to order the examination. The supreme court affirmed the power to order such examination, on the ground that the refusal of the plaintiff to be examined was an impediment to the administration of justice and a contempt of the court's authority; that he could be subjected to punishment as a recusant witness, who refuses to answer proper questions propounded to him; that the court could have stricken from the pleadings all allegations as to permanent injury in case of continued refusal; that such refusal would amount to a contempt; ¹⁸⁰ and, in admitting that there were no precedents, the court observed: "Great progress, however, in a comparatively recent period has been made, by legislative and judicial decisions, in the work of conforming the system of evidence to this germinal principle," that "whoever is a party to an action in a court, whether a natural person or a corporation, has a right to demand therein the administration of exact justice."

It is also mentioned with approbation that legislative changes in the system of common-law evidence have been made, as the abrogation of the rule which prohibited parties to a case from giving testimony therein, and some others. But it would seem that it was forgotten that the power to make such changes is vested in the sovereign through the legislative department. Thus, the right given the party to testify in a civil action, or to be examined by his adversary, is given by legislation, and it is assumed that no precedent can be found where a common-law court permitted a witness, a party to an action, to testify, until the legislature had changed the rule. The court also urges, in support of the principle affirmed by it, that those who effect insurance upon their lives and pensioners for

disability incurred in the military service of the country are all subject to examination of their bodies, and it is never deemed a dishonor or indignity. But these are voluntary, and by legislative authority only; and it is then admitted that no case has hitherto been found in which the question has been considered, except that 2 Bishop on Marriage and Divorce, section 590, mentions that in divorce cases, under the ecclesiastical law of England, when the impotency of the person is in question, an examination may be ordered of the person alleged to be impotent, and the court observes that the authorities mentioned by Bishop may be regarded as giving some support to its conclusion.

¹⁸¹ In *Stuart v. Havens*, 17 Neb. 211, three physicians had testified in behalf of plaintiff, who had made an examination of the person of the plaintiff, a man, and defendant requested that four physicians examine plaintiff. The trial court refused to make the order, and this refusal was affirmed by the supreme court, though the power to make such order for an examination was stated to be in the discretion of the court. This case followed that of *Sioux City etc. R. R. Co. v. Finlayson*, 16 Neb. 579, 49 Am. Rep. 724. There a man sued the railroad company, and, after all plaintiff's evidence was in, defendant requested an order for the examination of plaintiff's person by defendant's physicians. The trial court refused such order, because it deemed it had no power to make it. The supreme court affirmed the judgment of the lower court, because such order was deemed to be within the discretion of the trial court, observing that the court was inclined to believe the trial court had the power to order the examination.

In *Atchison etc. R. R. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659, the plaintiff, a man, had introduced physicians who testified to an examination of plaintiff's person, and the result that was deduced therefrom, when defendant applied for an order of examination by physicians to be appointed by the court. The lower court refused to make such order, and its judgment was affirmed by the supreme court, for the reason that sufficient expert testimony was introduced by the plaintiff, and that, such testimony having been supplied, it was within the discretion of the trial court to refuse to hear more; and the court observes that the only cases of which it has any knowledge considering the question are those of *Schroeder v. Chicago etc. Ry. Co.*, 47 Iowa, 375, and *Loyd v. Hannibal etc. R. R. Co.*, 53 Mo. 509. In the Iowa case the power to appoint

medical experts to examine the person was affirmed, and in the Missouri ¹³³ case denied. In *White v. Milwaukee City Ry. Co.*, 61 Wis. 536, 50 Am. Rep. 154, the opinion contains but few reasons, but observes that such examinations are frequently ordered in impotency and pregnancy, and its conclusion is based upon the authority of the Iowa case, *supra*, and *Walsh v. Sayre*, 52 How. Pr. 334. *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584, sustains the doctrine on the authority of *Walsh v. Sayre*, 52 How. Pr. 334.

In the case of *Graves v. Battle Creek*, 95 Mich. 266, 35 Am. St. Rep. 561, cited by appellant, and mentioned in the opinion of the majority, in favor of the doctrine, the plaintiff was a woman who had an injured arm and wrist, and appeared before the jury and testified to its condition, as also did a physician who had examined the arm. Upon the refusal of the plaintiff to remove her glove from the injured hand and exhibit the same to the jury, defendant asked for an order of the court directing that a medical expert examine the plaintiff's arm, which was refused by the court. The trial court refused the order on the ground that it had no power to direct such examination. This was reversed by the supreme court, which observes: "The rule recognizing, however, that a wide discretion is vested in the trial court, which justifies a refusal to require the examination where the necessities of the case are not such as to call for it, or where the sense of delicacy of the plaintiff may be offended by the exhibition, or where the testimony would be merely cumulative, or where, in the judgment of the trial court, it would not materially aid the jury."

In the case of *Richmond etc. R. R. Co. v. Childress*, 82 Ga. 719, 14 Am. St. Rep. 189, the trial court ruled that it had no power to order an examination of plaintiff's person by medical experts without plaintiff's consent. The supreme court cites a Georgia statute (Code, sec. 206), which declares ¹³³ that "every court has power . . . to control, in furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto"; and construes such statute to vest power in the court to order such an examination, concluding that it is vested in the sound discretion of the trial court alone.

Hatfield v. St. Paul etc. Ry. Co., 33 Minn. 130, 53 Am. Rep. 14, does not seem to sustain the view maintained by the appellant. The opinion is a short one. Plaintiff alleged injuries to one of her limbs which impeded her locomotion, and testified

before the jury. The defendant moved the court for an order directing the plaintiff to walk across the courtroom before the jury, which the trial court refused, for the reason that it had no power to make such order. The supreme court affirmed the judgment of the lower court, but remarked that the power to make such order was vested in the discretion of the trial court.

In *Owens v. Kansas City etc. R. R. Co.*, 95 Mo. 169, 6 Am. St. Rep. 39, the court concludes that the defendant has not an absolute right to have a personal examination, but that it is in the discretion of the trial court. It will be observed that in the cases above mentioned, with the exception of 47 Iowa, the case of *Walsh v. Sayre*, 52 How. Pr. 334, decided in 1877, is relied upon as a precedent to sustain the power of the court to order a physical examination. That case, however, was overruled by the appellate court of New York in January, 1883, in the case of *Roberts v. Ogdensburgh etc. R. R. Co.*, 29 Hun, 154, and it is observed in the opinion: "The order is so unusual that we may well inquire upon what authority of precedent or principle it rests. For precedent the defendant cites what is called the leading case of *Walsh v. Sayre*, 52 How. Pr. 334. That case was decided by the special term of the superior court of New York, ¹³⁴ in 1868, and was reported in 1877. The action was for malpractice, and the motion by the defendant was that the plaintiff submit to a personal examination by surgeons. The opinion states that there is no recorded case of an application for any such discovery having been granted. And the decision is based upon the analogy to discovery in chancery. We see no analogy whatever between the production of books and papers or the examination of a party by a bill of discovery, and the compelling of a party to expose his person to the inspection of physicians."

The court also observes that, in *Schroeder v. Chicago etc. R. R. Co.*, 47 Iowa, 375, "the doctrine contended for by defendants here was sustained." But that opinion cites no precedent or authority, and the court also observes, with reference to the cases cited in 2 *Bishop on Marriage and Divorce*, section 590: "Whatever may be the rule in such actions for divorce, nothing which is there said applies to this case. No such necessity exists. The injuries, if any, suffered by the plaintiff can be proved by ordinary common-law evidence, as similar injuries are proved every day. The other instances thought

by the defendant to be analogous are the trial by inspection and the writ de ventre inspiciendo. An examination of 3 Blackstone's Commentaries, 331, will show that the trial by inspection was a trial by the judges, not by a jury, of some single matter, obvious to sight, except in appeals of mayhem, which are matters long obsolete. No analogy exists between those proceedings and the present. The writ de ventre inspiciendo (1 Blackstone's Commentaries, 456; taken by the English law from the Roman Digest, 25, 4, 1, 10, and made indecent in the taking) has long become obsolete. If it shows anything in the present case, its disuse shows that such an invasion of the sacredness of the person as is here proposed cannot be permitted at this day. Thus the whole authority for this order rests, in the way of precedent, on the special term cases above cited": *Walsh v. Sayre*, 52 How. Pr. 334.

In *Peoria etc. Ry. Co. v. Rice*, 144 Ill. 227, ¹⁸⁸ at the close of the plaintiff's evidence in chief, counsel for defendant moved for an order that the plaintiff submit to an examination by four physicians named. The motion was overruled. The court cites a long line of authorities in sustaining the judgment of the trial court, and observes: "We do not think injustice is likely to result to a defendant by a refusal to make such an order. . . . Rules of practice must be laid down, not with reference to a single case, but to be applied generally; and we entertain no doubt that our conclusion heretofore announced on this subject is the better and safer practice": Citing a number of former decisions in that court denying the power to order such an examination. In *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, the trial court refused to require the plaintiff to submit to an examination of his injuries by surgeons appointed by the court for that purpose. The supreme court affirmed the judgment and observed: "There is no statute in this state conferring upon the circuit court the power to make such an order as was asked in this case. If such power exists, it is a power that inheres in the court, independent of any statutory provision. It is applicable alike to all, male and female, and is confined to an examination of no particular part of the person. To say that the power rests in the sound discretion of the court does not meet the case, for the real question is as to whether the power exists at all. . . . We think the better reason is against the existence of such a right, and, in the absence of some statute upon the subject, we do

not think the court should attempt to compel litigants, against their will, to submit their persons to the examination of strangers for the purpose of furnishing evidence to be used on the trial of a cause."

In the case of *McQuigan v. Delaware etc. R. R. Co.*, 129 N. Y. 50, 26 Am. St. Rep. 507, the sole question presented to the court was whether the supreme court has ¹³⁶ power, in advance of the trial of an action for personal and physical injury, to compel the plaintiff, on an application made in behalf of the defendant, to submit to a surgical examination of his person by surgeons appointed by the court with a view of enabling them to testify on the trial. This case contains an exhaustive review of the whole question. The court, by Andrews, J., observed:

"Upon the organization of the state government, our courts succeeded to the powers theretofore exercised by the courts of law and chancery in England, so far as they were applicable to our situation. It is a significant fact that not a trace can be found in the decisions of the common-law courts of England, either before or since the Revolution, of the exercise of a power to compel a party to a personal action to submit his person to examination at the instance of the other party. If the power existed, it is difficult to suppose that it would not have been frequently invoked. Actions for assault and battery, for injuries arising from negligence, and generally for personal torts, were among the most common known to the law, and yet, so far as we can discover, in no case was it supposed or claimed that the court was armed with this jurisdiction. The nonexercise of a power is not conclusive against its existence, but it is strange, if the power in question existed, it should have been unused for centuries and never have been called into activity. . . . The only authority in the English common-law courts in any degree analogous is found in the power which the courts of England have occasionally, though rarely, exercised, to issue on the application of apparent heirs the writ de ventre inspiciendo. . . . This practice in England is sui generis and has never been adopted here. . . . The doctrine of the cases in chancery . . . (*Devanbagh v. Devanbagh*, 5 Paige, 554, 28 Am. Dec. 443; *Newell v. Newell*, 9 Paige, 25), that in an action to procure a decree of nullity of marriage on the ground of impotence or sexual incapacity, the chancellor may compel the defendant to submit to a surgical ex-

amination, is a graft from the civil and common [canon] law, and, as has been said, 'rests upon the interest which the public, as ¹³⁷ well as the parties, have in the question of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to exercise its jurisdiction.'

. . . . The power to compel a party to submit to an examination of his person has never been conferred by any statute.

. . . . But we have to deal only with the question of the power of the courts, in the absence of any legislation. It is very clear that the power is not a part of the recognized and customary jurisdiction of courts of law or equity. The doctrine that courts have an inherent jurisdiction to mold the proceedings to meet new conditions and exigencies is true, but in a limited sense. They cannot, under cover of procedure or to accomplish justice in a particular case, invade recognized rights of person or property. . . . We think the assumption by the court of this jurisdiction, in the absence of statute authority, would be an arbitrary extension of its powers."

The case of Union Pac. Ry. Co. v. Botsford, 141 U. S. 250, was where the single question before the court was whether, in a civil action for an injury to the person, the court, on application of the defendant and in advance of the trial, could order the plaintiff, without his or her consent, to submit to a surgical examination as to the extent of the injury sued for. This case is an exhaustive and thorough statement, upon authority and principle, of the controversy, and the principle enunciated that no power exists in the court to order such an examination of the person of the plaintiff. The court observed of the cases cited by appellant: "Within the last fifteen years . . . a practice to grant such orders has prevailed in the courts of several of the western and southern states, following the lead of the supreme court of Iowa in a case decided in 1877. The consideration due to the decision of those cases has induced us fully to examine, as we have done above, the precedents and analogies on which they rely. Upon mature advisement, we retain our original opinion that such an order has no warrant of law."

¹³⁸ It would seem that no authority should be inferred from the very rare instances in the ecclesiastical courts of ancient England for granting an order for the examination of the person for a single purpose, when the nullity of marriage was the issue. With the exception of the cases of Le Barron

v. Le Barron, 35 Vt. 365, and Devanbagh v. Devanbagh, 5 Paige, 554, 28 Am. Dec. 443, and the allusion by Bishop on Marriage and Divorce, supra, there does not seem to be any American authority that has ever supposed these instances of the ecclesiastical law were a part of the common law of this country or England. The action of divorce in this state, and perhaps universally now, is purely statutory. The grounds for divorce are statutory. The procedure and method of taking evidence in the ecclesiastical court has never been used in this country or in a court of common law, and the ecclesiastical law was never a part of the common law. The action of divorce is purely a civil action, and the procedure provided by legislation is that of other civil actions. In Page v. Page, 51 Mich. 88, which was a divorce case, upon the production of testimony before the commissioner, physicians were produced by counsel for plaintiff who examined the person of the defendant, and the eminent jurist, Judge Cooley, delivering the opinion of the court, observed of this examination: "There was also a most extraordinary compulsory examination of the defendant by physicians, who stripped him and subjected him to oral inquisition, to compel him to give evidence which they could repeat before the commissioner for use against him. What means they could be supposed to have for compelling him to answer their questions, in case he declined, as he ought to have done, we do not know; but we are certain they could not be means known to the law. We strike from the record all the evidence obtained by this inquisition also. It should be understood that there are some rights which belong to man as man and ¹³⁰ to woman as woman which in civilized communities they can never forfeit by becoming parties to divorce or any other suits, and that there are limits to the indignities to which parties to legal proceedings may be lawfully subjected."

The same high authority, in Cooley on Torts, page 29, declares: "The rights to one's person may be said to be a right to complete immunity; to be let alone." And this definition is approved in Union Pac. Ry. Co. v. Botsford, 141 U. S. 250.

Neither can there be a sound argument founded upon the fact that actions for personal injuries may have become more frequent in recent years, and that counties, cities, and other municipal corporations are liable for negligence resulting from injuries to persons. Certainly, the public policy which authorized these actions is entirely a subject of legislation. The

legislature of this state has authorized actions for personal injuries against counties and municipal corporations. If it be questionable policy, the argument against their maintenance is a legislative, rather than a judicial, one. It does not seem that the necessity exists, in obtaining justice in the trial of these cases, to overturn ancient principles of personal liberty, and, if it did, it should be remitted to the law-making department of the state.

Fullerton, J., concurs in dissenting opinion.

PHYSICAL EXAMINATION OF PARTIES TO ACTIONS.—A plaintiff, in an action for personal injuries, may, in the discretion of the court, be required to submit himself to a medical or surgical examination respecting his injuries whenever justice requires it, and an order for his physical examination may be enforced by staying the trial or dismissing the case: See monographic note to *Cleveland etc. Ry. Co. v. Huddleston*, 68 Am. St. Rep. 244, 248, 250, on the physical examination of parties by order of court.

NEGLIGENCE—USE OF CARE—QUESTION OF FACT.—Whether a party was in the exercise of ordinary care in a particular case is a question of fact for a jury: *Jefferson v. Chapman*, 127 Ill. 438, 11 Am. St. Rep. 136. When a question of contributory negligence is not free from doubt, the fact should be submitted to the jury: *Engel v. Smith*, 82 Mich. 1, 21 Am. St. Rep. 549; *City Ry. Co. v. Lee*, 50 N. J. L. 435, 7 Am. St. Rep. 793. Negligence is a question for the jury where the facts are disputed, or where, from the undisputed facts, different minds may reasonably draw different conclusions as to the existence of negligence: *Brotherton v. Manhattan etc. Imp. Co.*, 48 Neb. 563, 58 Am. St. Rep. 709; *Watson v. Portland etc. Ry. Co.*, 91 Me. 584, 64 Am. St. Rep. 268; *Lowe v. Salt Lake City*, 13 Utah, 91, 57 Am. St. Rep. 708.

WITNESSES—COMPETENCY—PHYSICIANS.—Communications made by a patient to his physician for the purpose of professional aid and advice are privileged: Note to *Nelson v. Oneida*, 36 Am. St. Rep. 559. Under the statute, the testimony of an attending physician, if offered by the patient or his representative, is competent, but not otherwise: *Groll v. Tower*, 85 Mo. 249, 55 Am. Rep. 358.

TIPTON v. MARTZELL.

[21 WASHINGTON, 273.]

EXECUTION.—A GROWING CROP is not subject to levy under execution against a tenant, where it was planted by him under an agreement with his landlord that the tenant should properly care for, harvest, and deliver to the owner a certain portion of the product.

Action by Tipton and others against Martzell and others. The defendants appealed from an order overruling a demurrer.

R. G. Blair, for the appellants.

Trimble & Pattison, for the respondents.

²⁷³ REAVIS, J. Upon a judgment in favor of appellant Martzell against respondents, appellant Sima, as sheriff, attempted to levy upon an immature growing crop of about ²⁷⁴ two hundred and forty acres of wheat, on the 10th of May, 1898. The wheat could not be ripe for harvest until September following. Respondents planted the crop of wheat under a contract with the owner of the land, by which they were to properly care for and harvest the crop and deliver to the owner one-third of all the grain harvested upon the premises. Respondents commenced this action to restrain appellants from selling the crop of grain. Appellants filed a general demurrer to the complaint, which was overruled, and they appealed from the order.

The question presented is, whether the growing crop of wheat owned by the tenants under the terms stated is subject to levy and sale. It is maintained by counsel for appellants that, at common law, growing crops, the result of annual cultivation and labor—*fructus industriales*—are personal property, while those that are the natural and spontaneous growth of the land—*fructus naturales*—are realty; and a number of authorities are cited to sustain the proposition. The leading case cited by counsel is that of *Polley v. Johnson*, 52 Kan. 478, from the supreme court of Kansas. The Kansas statute (Gen. Stats. 1889, par. 2824), provided: "The emblements or annual crops raised by labor, and whether severed or not from the land of the deceased at the time of his death, shall be assets in the hands of the executor or administrator, and shall be included in the inventory."

Paragraph 2825 provided: "The executor or administrator, or the person to whom he may sell such emblements, may, at all reasonable times, enter upon the lands to cultivate, sever, and gather the same."

Paragraph 5008, part of the procedure before justices of the peace, provides: ²⁷⁵ "In all cases where any lands may have been let, reserving rent in kind, and when the crops or emblements growing or grown thereon shall be levied on or attached by virtue of any execution, attachment, or other process against the landlord or tenant, the interest of such landlord or tenant against whom such process was not issued shall not be affected thereby; but the same may be sold, subject to the claim or interest of the landlord or tenant against whom such process did not issue."

The court observes that, while these sections do not reach the case, they show a recognition of what they regard as the settled doctrine of common law—that such growing crops are personal property subject to sale on execution for the debts of the owner—and determine the cause with the observation: "However much we may disapprove of the policy of the law, we are constrained to hold that the growing wheat attached in this case was subject to levy."

Based upon the rule that, at common law, the growing crop passed to the administrator, many cases are found affirming the validity of such levy under an execution as upon personal property. In some of the states, provision is made to extend the lien of the execution until an immature crop is ready for harvest, and in other states the levy upon a growing crop is permitted by statute. The only statute that has been called to our attention upon the subject of growing crops is section 1646 of 1 Hill's Code, which authorizes a chattel mortgage upon them. An execution does not create a lien for an indefinite period, or any period beyond its life. Section 469 of 2 Hill's Code requires an execution to be returned within sixty days. In *Ellithorpe v. Reidesil*, 71 Iowa, 315, it was determined that an execution could not be levied upon immature growing crops. The court observed: "The whole proceeding was on the theory that the crops were personal property, and could be levied on and sold ²⁷⁶ as such. But while they remained immature and were being nurtured by the soil, they were attached to and constituted part of the realty. They could no more be levied upon and sold on execution as personalty than could the trees growing upon the premises." And a number of former deci-

sions of the court are cited in support of its conclusion. It has been well observed that the value of the growing crop depends upon the soil for its nourishment and support, and, if disconnected at once, as in this case, would be nothing, and levy and sale usually offers but little return to the creditor, while it is oftentimes serious loss to the debtor.

In *Penhallow v. Dwight*, 7 Mass. 34, 5 Am. Dec. 21, an entry and levy upon a crop of corn fully ripe and fit to be gathered was sustained upon the ground that the crop was fully ripe and in a proper state to be gathered; but the court observed: "An entry, for the purpose of taking unripe corn, or other produce which would yield nothing, but in fact be wasted and destroyed, by the very act of severing it from the soil, would not be protected by this decision."

But in the case at bar there was an existing contract between the landlord and the respondents that they would properly take care of the growing grain, and harvest and deliver one-third of the product to the landlord. In a contract of this nature the landlord depends on the character and skill of the lessee, and it would seem to be personal and not assignable. It was said by the supreme court of Michigan, in *Randall v. Chubb*, 46 Mich. 311, 41 Am. Rep. 165: "The very nature and character of the lease or agreement shows that it was a personal one to the defendant, and could not be assigned by him to a third party without the consent of his lessor. The rent or share which the latter would receive must depend very much upon the character of the lessee, and the latter could not place a ²⁷⁷ party in possession of the premises who might not be a good husbandman, and who might not be able to carry on the farm operations in a good, careful, and proper manner. Under such a lease the landlord has a right to choose his tenant, and he may be willing to lease upon shares to one man, and yet be wholly unwilling to let another have possession upon any terms."

It is evident that, if a sale of the crop were permitted within the life of the execution, the agreement by which the landlord was entitled to have the lessees give their personal care and attention to the growing crop would be abrogated, and the process would substitute the purchaser at execution sale as one of the parties to the lease. It may also be observed that, under our law, the administrator takes possession of the realty, and that the proceeds of its products may be used in payment of

the debts of the deceased, as well as the proceeds from the realty.

We conclude that the crop, under the facts shown here, was not subject to the levy of the execution, and the judgment of the superior court is affirmed.

Gordon, C. J., and Dunbar, Anders, and Fullerton, JJ., concur.

EXECUTION—GROWING CROPS.—A cropper has no such interest in the crop as can be subjected to the payment of his debts while it remains en masse; until a division, the whole is the property of the landlord: *Brazier v. Ansley*, 11 Ired. 12, 51 Am. Dec. 408. But that a landlord and tenant are tenants in common of growing crops when rent is reserved in a share thereof, and that the interest of either is subject to levy and sale for the payment of the debts of the respective parties, see *Sims v. Jones*, 54 Neb. 769, 69 Am. St. Rep. 749. That growing annual crops are personal property and subject to execution, see *State v. Fowler*, 88 Md. 601, 71 Am. St. Rep. 452; note to *Barrett v. Choen*, 12 Am. St. Rep. 366; *Edwards v. Thompson*, 85 Tenn. 720, 4 Am. St. Rep. 807; and extended note to *Norris v. Watson*, 55 Am. Dec. 162.

DAWSON v. McCARTY.

[21 WASHINGTON, 514.]

APPEAL—SUFFICIENCY OF BOND—REVENUE STAMP. The federal war revenue law of 1898 exempts from its operation bonds used in legal proceedings. Hence, an appeal bond is good, though it has no revenue stamp attached to the certificate of the qualification of the sureties to the bond, where it is otherwise valid.

MORTGAGES—SUBSEQUENT JUDGMENT—PRIORITY.—THE LIEN of a judgment is subordinate to that of an unrecorded mortgage executed prior to the rendition of the judgment.

DEFINITIONS.—THE TERM "BONA FIDE PURCHASERS" in recording acts does not include a judgment creditor.

Suit by Dawson, as receiver, against McCarty and others. The plaintiff appealed from the decree.

Stratton & Powell, for the appellant.

John R. Crites, for the respondent.

²¹⁵ REAVIS, J. Appellant brought suit to foreclose a mortgage on certain lands in Whatcom county. The mortgage

was executed by the defendants Morris McCarty and wife to the Columbia National Bank of New Whatcom, of which the appellant is receiver. Respondent (defendant) School District No. 1 of Whatcom county has a judgment against defendants McCarty and wife, which is a lien upon the mortgaged premises. On the 16th of September, 1893, the bank was in the custody of a receiver appointed by the comptroller of the currency. At that time the defendant Morris McCarty was indebted to the bank in the sum of twenty-five thousand four hundred and ninety dollars and eight cents, exclusive of interest. The indebtedness was in the form of promissory notes and overdrafts made prior to June 23, 1893. The greater portion of the indebtedness was due September 18, 1893. On the 16th of September, 1893, the defendants McCarty and wife, for the purpose of securing the payment on October 1, 1894, of all said indebtedness, executed their mortgage upon the real estate in controversy. The mortgage specifically extended the time of payment of all indebtedness to October 1, 1894. On the day of its execution the mortgage was delivered to the attorney of the receiver, to be held by him in escrow until it could be submitted to, and the terms approved by, the comptroller of the currency, and thereupon be delivered to the receiver of the bank. On the 27th of September, 1893, the comptroller of the currency duly authorized and approved the acceptance of the mortgage by the receiver, and the mortgage was thereafter ^{and} delivered by the attorney to the receiver about the 5th of January, 1894. The mortgage was not filed for record until March 8, 1894. On the 2d of August, 1892, the defendant school district instituted an action in the superior court against defendant Morris McCarty, and on the sixth day of February, 1894, recovered judgment against him for the sum of eighteen hundred and thirty-one dollars and thirty-nine cents, exclusive of interest. At the time of the entry of the judgment the school district had no notice of the existence of appellant's mortgage. By a mistake a portion of the property covered by the mortgage was incorrectly described as the west half of a certain quarter section, when it should have been described as the east half of the same quarter section. The superior court corrected this error and reformed the mortgage. That court also adjudged the mortgage inferior to the judgment lien of the school district. To this portion of the decree the plaintiff (appellant) excepted.

1. Respondent moves to dismiss the appeal on the ground that no proper notice of appeal was given or served and that no valid bond has been given or filed in the cause, because no revenue stamp is attached to the certificate of the qualification of the sureties to the bond. The notice of appeal is clear, and conveyed fully to the adverse parties the fact of the appeal. And the objection to the bond is not well taken. The certificate to the qualification of the sureties is part of the proper execution of the bond on appeal. The federal revenue law exempts bonds used in legal proceedings: War Revenue Law of 1898, sec. 25, schedule "A." And again, it is elementary constitutional law that the federal government cannot impose any burden upon procedure in state courts: *Collector v. Day*, 11 Wall. 113; *Cooley on Taxation*, 82-86, and authorities cited.

2. The controversy upon the merits is, Which is the prior lien—the mortgage or judgment? At common law, ³¹⁷ the uniform rule seems to have been that a prior unrecorded deed or mortgage conveyed good title as against a subsequent judgment. The rule is thus stated in 2 *Freeman on Judgments*, section 366: "Wherever, under the law, a deed or mortgage is valid without being recorded, a subsequently attaching judgment lien against the grantor or mortgagor will not be of any benefit to the lienholder as against the deed or mortgage. Under the principle already referred to, that the lien of a judgment attaches to the debtor's real, rather than to his apparent, interest, such lien is subordinate to any unrecorded conveyance or encumbrance executed prior to the rendition of the judgment, unless the statutes of the state give to judgment creditors the same protection against unrecorded instruments which they give to bona fide purchasers without notice."

Mr. Pomeroy, in his work on Equity Jurisprudence, section 721, under the caption, "Prior unrecorded mortgage superior to subsequent docketed judgment," observes: "The most important question under this head which has come before the American courts relates to the respective claims arising from a prior specific and a subsequent general lien. The doctrine is certainly established as part of the equity jurisprudence, and rests upon the solid basis of principle, that prior equitable interests in rem, including equitable liens upon specific parcels of land, have priority of right over the general statutory lien of subsequent docketed judgments, although the latter is legal in its nature. Judgment creditors are not 'purchasers' within

the meaning of the recording acts, and unless expressly put upon the same footing, they do not obtain the benefit which a subsequent purchaser does by a prior record. The equitable doctrine is, that a judgment and the legal lien of its docket binds only the actual interest of the judgment debtor, and is subject to all existing equities which are valid as against such debtor."

Mr. Pomeroy also further says, in section 722, that: "A very different rule prevails in many states, in which it is settled that the lien of a subsequent docketed judgment ²¹⁸ prevails over that of a prior unrecorded mortgage or other prior equitable interest or lien not recorded, of which the judgment creditor had no notice at the time of recovering and docketing his judgment. This result is reached, in some of the states, from express provisions of the statutes; in others, from what was deemed to be the necessary interpretation of the statutory language; and in a few, as it would seem, from an intentional rejection of the equitable doctrine which lies at the basis of the whole subject."

Our statute is as follows: "All deeds, mortgages, and assignments of mortgages, shall be recorded in the office of the county auditor of the county where the land is situated, and shall be valid as against bona fide purchasers from the date of their filing for record in said office; and when so filed shall be notice to all the world": Ballinger's Code, sec. 4535.

From an examination of the authorities submitted by counsel for respondent it would seem that, in the states of Illinois, Texas, West Virginia, Alabama, South Carolina, and Georgia, the recording statute extends the protection to subsequent creditors. The decided weight of authority seems to be that the term "bona fide purchasers" in the recording act does not include a judgment creditor: 20 Am. & Eng. Ency. of Law, 577; Seevers v. Delashmutt, 11 Iowa, 174, 77 Am. Dec. 139; Vaughn v. Schmalsele, 10 Mont. 186; Plant v. Smythe, 45 Cal. 161; Shirk v. Thomas, 121 Ind. 147, 16 Am. St. Rep. 381; Webb on Record of Title, sec. 192; Davis v. Owensby, 14 Mo. 170, 55 Am. Dec. 105; Holden v. Garrett, 23 Kan. 98.

It appears that it is immaterial whether the mortgagee is strictly a bona fide purchaser, within the meaning of the statute. The question is, whether the judgment creditor is a bona fide purchaser, and thus within the protection of the statute:

Greenleaf v. Edes, 2 Minn. 265; ³¹⁰ Martin v. Nixon, 92 Mo. 26; Rodgers v. Gibson, 4 Yeates, 111.

The lien of the judgment, as already observed, binds only the interest that the judgment debtor actually has in the real estate: Laws 1893, sec. 1, p. 65; Voorhies v. Hennessy, 7 Wash. 243; Book v. Willey, 8 Wash. 267.

The case of Goetzinger v. Rosenfeld, 16 Wash. 393, has been relied upon by counsel for respondent to sustain the priority of its judgment lien. But a careful consideration of that case shows that the precise question involved here was not raised or discussed there. In that case the judgment was rendered and the mortgage executed on the same day, and both were entered of record on the same day; and the court declined to inquire by oral testimony into the fraction of a day, to determine whether the judgment or the mortgage was first filed of record, and merely left them upon the record as it appeared on the face thereof.

The judgment must be reversed, with direction to adjudge the lien of the mortgage prior to that of the judgment.

Gordon, C. J., and Anders and Fullerton, JJ., concur.

LIENS OF JUDGMENT AND PRIOR UNRECORDED MORTGAGE—PRIORITY—BONA FIDE PURCHASERS.—A judgment creditor is not a bona fide purchaser, within the meaning of the registry law, where the sole foundation of his right is his own judgment; and he cannot prevail against a purchaser in good faith holding under an unrecorded deed: Shirk v. Thomas, 121 Ind. 147, 16 Am. St. Rep. 381. A judgment lien is subject to all equities in favor of third persons as to the debtor's lands at the time the judgment was rendered, but this rule is qualified by the registration laws of particular states: Blankenship v. Douglas, 26 Tex. 225, 82 Am. Dec. 608, and note. The lien of an equitable mortgage is superior to that of subsequent judgments: Bank v. Carpenter, 7 Ohio, 21, 28 Am. Dec. 616. That the lien of a judgment takes priority over a prior unrecorded mortgage, see Manufacturers' etc. Bank v. Bank, 7 Watts & S. 335, 42 Am. Dec. 240; or deed: See Reed v. Austin, 9 Mo. 722, 45 Am. Dec. 336.

WILSON v. WOLD.

[21 WASHINGTON, 398.]

STATUTES—CONSTITUTIONALITY—IMPAIRING OBLIGATION OF CONTRACTS—RENTS AND PROFITS DURING PERIOD FOR REDEMPTION.—A statute which entitles a judgment debtor whose real estate is sold on execution to possession, and to the rents, issues, and profits of the property during the period for redemption, is not unconstitutional as to a debt contracted before its passage, on the ground that it impairs the obligation of a contract, although, under the statute existing when the debt was contracted, the purchaser at an execution sale was entitled to the rents and profits during such period. The creditor, under such a condition of the law, is not deprived of any remedy for the enforcement of his contract.

ACTION—RIGHT OF, WHERE AGENCY IS KNOWN.—A third person's right of action to recover money lawfully collected by an agent for his principal is against the principal and not against the agent, where the plaintiff knew that the defendant was merely an agent.

Robinson & Rowell, for the appellant.

Fred H. Peterson and L. P. Wilhelm, for the respondent.

see GORDON, C. J. In May, 1897, a money judgment was rendered in favor of George F. Aust against the appellant, Wilson. The judgment was given upon an indebtedness arising upon an open account incurred by appellant in the year 1896. In July, 1897, certain real property of appellant was sold upon an execution to satisfy that judgment, and Aust became the purchaser at the sale. The sale was confirmed and the purchaser appointed respondent, Wold, to collect rent of the premises. Shortly before the expiration of the year allowed by law for redemption, appellant redeemed. This action was brought to recover the rents received by respondent, as agent for the purchaser, during the redemption period. The action was dismissed in the superior court on the ground that section 5299 of Ballinger's Code, which went into effect March 16, 1897, was unconstitutional in so far as it applies to debts contracted prior to its passage. This appeal is from the judgment and order of dismissal.

Prior to the passage of section 5299, *supra*, a purchaser of real estate at execution sale was entitled to the rents and profits during the period allowed by law for redemption. That section provides as follows: 400 "In all cases hereafter wherein any real estate or other property is sold, either under execution,

foreclosure, or other judicial proceedings, which is at the time of such sale by law subject to redemption, the judgment debtor, or those claiming by, through, or under him, shall, as against the purchaser, or those claiming by, through, or under him, be entitled to the possession and to the rents, issues, and profits of such real estate or property during the full period provided by law for the redemption of the same."

Respondent insists that the law existing at the time when a debt is incurred enters into and forms a part of the contract of indebtedness, and that a person entitled to enforce such contract is entitled to protection against any change in existing remedies affecting materially his rights under the contract, and he cites and relies upon *Swinburne v. Mills*, 17 Wash. 611, 61 Am. St. Rep. 932, and *Bettman v. Cowley*, 19 Wash. 207. With this insistment we do not disagree, but we think the cases cited are easily distinguishable from the present one. *Swinburne v. Mills*, 17 Wash. 611, 61 Am. St. Rep. 932, involved the constitutionality of pages 70-76, chapter 50, of the Laws of 1897. The plaintiff in that case was the holder of a mortgage on real estate. Under the law of the state in existence at the date of the execution of the mortgage, he was entitled upon foreclosure to an immediate sale, and the purchaser at such sale to the immediate possession of the property, subject to the right of redemption. The effect of the legislation called in question in that case was to postpone the date of sale for one year from the entry of judgment. The act also provided for an appraisal of the property, and imposed terms and conditions upon the mortgagee which, in the judgment of the court, impaired and lessened the value of his mortgage.

The case of *Bettman v. Cowley*, 19 Wash. 216, involved the constitutionality of sections 5148 and 5150 of Ballinger's Code (Laws 1897, ⁴⁰¹ p. 52), fixing the life of a judgment at six years, and repealing prior provisions of the law authorizing a renewal. The effect of that legislation upon contracts or judgments theretofore entered into or rendered is thus stated in the opinion of the court: "The action of the legislature has not only tended to lessen the efficacy of the means which then existed, it has not only tended to retard the enforcement of the contract, but it has destroyed the means of its enforcement altogether, and has supplied no other means in its stead."

We have no desire to depart from the doctrine announced in those cases, but we think the present case does not fall within any principle decided in either of them. It cannot be claimed

that the act now under consideration deprives the creditor of a remedy for the enforcement of his contract, nor that such remedy is not full, complete, and ample. The right to rents and profits of real estate sold upon execution did not result from the contract of indebtedness. It was a matter of legislative favor. It was conferred upon the purchaser at the sale, who might or might not be a party to the contract terminating in the judgment. The statute conferred the right upon the purchaser regardless of whether he was a party to the contract or not. The enforcement of the contract was not postponed or retarded by the act in question. It deprived the creditor of no remedy, and left his right to collect his debt unimpaired. The sale that was made was for an amount sufficient to satisfy the judgment. The contract was merged in the judgment and satisfied with it. The rights of the purchaser at that sale were fixed by the statute in force at the time it was made. That statute constituted the full measure of his rights, and, when the judgment creditor became the purchaser at the sale, he acquired no greater rights than any other purchaser could. It will not do to hold that a change in the ⁴⁰² law, which occurs after a contract is fully satisfied and discharged, impairs the obligation of it. The change could not affect the contract, because there was no contract upon which it could operate; the creditor had his money—the full sum contemplated by the contract—and the purchaser got just what the statute in force at the date of sale provided he should get. No right was injuriously affected by the change. Our conclusion upon this branch of the case is that the superior court erred in holding the act in question unconstitutional.

But the judgment must be affirmed upon another ground. As observed, respondent here was merely the agent of the purchaser. The fact of his agency was known to the appellant. At the time of their collection the law entitled him to collect these rents, and, had not the appellant subsequently redeemed the property, respondent's principal would have been entitled to retain the rents so collected. So that originally the money was rightfully received by respondent as agent for his principal, the purchaser at the sale. The fact of agency being known, appellant's right of action was against the principal, and not against the agent. The law upon this question is, we think, too well settled to admit of doubt or controversy: *United States v. Pinover*, 3 Fed. Rep. 305; *Colvin v. Holbrook*, 3 N. Y.

126; *Hall v. Lauderdale*, 46 N. Y. 70; 1 Am. & Eng. Ency. of Law, 2d ed., 1119.

In his brief, counsel for the respondent has insisted upon an affirmance upon this ground, regardless of the disposition made by the court of the question first discussed herein. No reply has been made to such argument by appellant's counsel, and, upon the record before us, the judgment must be affirmed.

Fullerton, Anders, and Reavis, JJ., concur.

STATUTES—CHANGE OF REMEDY.—THE OBLIGATION OF A CONTRACT cannot be impaired by the legislature, though it may alter the remedy to enforce it at will, provided it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the value of the right; and this authority over remedies may be exercised at pleasure over past or future contracts: *Beverly v. Barnitz*, 55 Kan. 466, 49 Am. St. Rep. 257, and note at page 277.

McDOUGALL v. WALLING.

[21 WASHINGTON, 478.]

JUDGMENT—VACATING FOR FRAUD—PERJURY.—Under a statute authorizing a judgment to be vacated for fraud, but which does not specify perjury as a distinctive ground for vacating a judgment, perjury by the prevailing party to an action, discovered after the trial, is not such fraud as will justify the vacation of a judgment in his favor, where the judgment did not rest upon the alleged false testimony alone but was supported by other evidence.

JUDGMENT—VACATING FOR FRAUD—PERJURY—NECESSITY OF ADDITIONAL CIRCUMSTANCES.—If an action is brought against a principal and his surety, and the latter successfully evades liability on the ground that his principal had been given an extension of time without the surety's consent, perjury committed in such action, by the surety, in testifying that he had not received any consideration from the principal for becoming surety, when in fact he had received a consideration, is not such fraud practiced by the prevailing party as will authorize the vacating of the judgment, where there were no circumstances coupled with the perjury which would relieve the opposite party from all implication of want of diligence, and completely deceive him in the nature of the testimony.

JUDGMENT—VACATING FOR FRAUD—FAILURE TO DISCLOSE EVIDENCE.—The fact that a prevailing party defendant failed to voluntarily disclose the weakness of his defense, or some evidence which would tend to overthrow his defense, does not authorize the vacating of the judgment on the ground of fraud.

S. H. Piles and Donworth & Howe, for the appellant.

J. A. Coleman, for the respondent, Swalwell.

⁴⁷⁰ REAVIS, J. Appellant filed his petition in the superior court of Snohomish county, praying that a judgment recovered by respondent Swalwell against appellant be vacated on the grounds of fraud practiced by the respondent in obtaining the judgment, and because of after-discovered evidence which would have changed the result had it been produced at the trial, but which was suppressed by Swalwell. The cause has been before this court twice, reported in McDougall v. Walling, 15 Wash. 78, 55 Am. St. Rep. 871, and in 19 Wash. 80. A concise statement is found in the opinion on the first appeal in McDougall v. Walling, 15 Wash. 78, 15 Am. St. Rep. 871, as follows:

⁴⁸⁰ "Appellant, McDougall, brought this action in the superior court of Snohomish county upon a promissory note executed by N. D. Walling and William G. Swalwell, payable to the order of Walling, dated April 24, 1893, and payable ninety days thereafter; said note being for the sum of two thousand eight hundred dollars, and interest at the rate of twelve per cent per annum from date until paid. The defendant Walling made default. Respondent Swalwell answered that he executed the note solely for the accommodation of Walling, and was a surety only, all of which was known to plaintiff at the time of the indorsement and delivery of said note to him by Walling; that, after the maturity of the note, appellant entered into a definite agreement with the defendant Walling, whereby the time of payment of said note was extended, and that the agreement to extend was made without the consent of the respondent, and released him from the payment thereof. The appellant replied, denying all of the affirmative matter set out in the answer, and, the cause having been tried before a jury, a verdict was returned in favor of Swalwell. Thereafter, appellant's motion for a new trial was denied, judgment entered dismissing the action as to Swalwell, and the cause appealed."

The judgment then before this court was reversed for error in instructing the jury. On March 16, 1897, the cause was tried again in the superior court, and the jury found, in response to the issue in the case, specially that respondent Swalwell did not sign the note in suit as a joint maker; that he signed it as surety only; that appellant, McDougall, at the time he bought the note, knew that Swalwell signed it as surety only; that Swalwell did not consent that Walling might obtain an extension of time on the note; that Walling did not obtain the

extension on a misrepresentation or false statement that Swalwell knew of his application and consented that the time might be extended; that Swalwell did not promise to pay the note after the extension of time had been granted; and judgment was again entered in favor of Swalwell. An appeal ⁴⁸¹ was again taken, which was determined and is reported in *McDougall v. Walling*, 19 Wash. 80; and it was there observed: "Appellant [*McDougall*] also maintains that the evidence does not justify the verdict, but it is sufficient to say upon this point that the evidence in the record here is substantially conflicting, and the jury found for the respondent upon all the issues submitted to it, and the superior court declined to grant a new trial upon this ground."

After the affirmance of the last judgment here, the appellant applied to this court to vacate the judgment, but was remanded to the superior court, and filed his petition to vacate the judgment upon the grounds of fraud on the part of Swalwell in procuring it, and newly discovered evidence which would change the result. Respondent Swalwell was sworn as a witness in his own behalf at the trial and testified as follows:

"Q. You may state, Mr. Swalwell, the circumstances under which you came to sign that note. A. Mr. Walling applied to me for a loan in April in 1893 for the purpose of buying some Valentine scrip; I told him I did not have any money to loan, and a few days afterward he had made a trip to Seattle he had said and said he could raise the money if I would go his security; said he had used my name down there and suggested my name as security, and after going into the matter for which he was to use the money, explained the townsite business thoroughly, I agreed to go his security for ninety days.

"Q. Did you receive any proceeds on that note? A. No, sir.

"Q. Did you receive any consideration from Mr. Swalwell for signing that note? A. From Mr. Walling?

"Q. From Mr. Walling for signing that note? A. No, sir.

"Q. Did you receive any consideration for [from] anyone for the execution of that note? A. No, sir."

⁴⁸² Appellant, since the final decision of the case, has discovered written evidence, which was within respondents' knowledge, tending to show that at the time the note in question was executed the money obtained upon the note was for the purpose of procuring Valentine scrip to be placed upon the townsite of Silverton, in Snohomish county, and that the stock of

the townsite company, consisting of four hundred and ninety-nine shares, was to be held in escrow to secure and protect Swalwell as security upon the note; and that Walling also agreed to pay Swalwell, in consideration of his becoming surety on the note, seven hundred and fifty dollars in cash, or to deliver him fifteen hundred dollars in stock of the company, as Swalwell might elect; and that the account of the company was to be kept in the First National Bank of Everett, of which Swalwell was president; that, in case Walling paid the note, the stock of the company should be returned to him, but, in case of his default, the stock was to be turned over to Swalwell; and it is also alleged in the petition that the stock mentioned was of a greater value than the amount due on the note.

1. The petition to vacate the judgment is presented under subdivision 4 of section 5153 of Ballinger's Code. It is maintained by counsel for appellant that perjury is such fraud as warrants the vacation of a judgment obtained by a party committing it, and that the respondent committed perjury at the trial; and authorities are cited from states with statutes relating to vacations of judgment similar to that of our state.

In *Heathcote v. Haskins*, 74 Iowa, 566, the court observed: "That the production upon the trial of false testimony to establish a cause of action or defense would in many cases amount to such a fraud as would entitle the adverse party to a new trial, or the vacation of the judgment, is certainly true. This would be so if the fact of its falsity or the evidence by which the fact could be established was ⁴⁶³ not discovered until after the trial or the rendition of the judgment." But in that case the fraud was not made out to the satisfaction of the court.

In *Munro v. Callahan*, 55 Neb. 75, 70 Am. St. Rep. 366, the judgment had been rendered in favor of plaintiff. After its affirmance, the defendant filed a petition to vacate the judgment on the ground that it had been obtained by the perjury of the plaintiff, and on the appeal it was said: "Section 602 of the Code of Civil Procedure provides that a district court shall have power to vacate a judgment rendered by it after the term at which it was rendered, for fraud practiced by the successful party in obtaining the judgment. Certainly, the obtaining of a judgment by willful and corrupt perjury is obtaining it by fraud."

But in this case the sole testimony was that of the plaintiff, and the judgment was obtained on her testimony alone. So

of the case of *Laithe v. McDonald*, 12 Kan. 340. *Laithe* brought an action against *McDonald* for failure to deliver goods which he charged were received by *McDonald* as a common carrier and lost through his negligence. *McDonald* answered by a general denial, and did not appear further in the case. On the trial, *Laithe* willfully, corruptly, and falsely swore that *McDonald* was a common carrier, and had received the goods and failed to deliver them, and that they were worth over five thousand dollars, for which he obtained a judgment. The court affirmed the judgment of the district court vacating the judgment on the ground that *Laithe* obtained it by fraud, the fraud consisting of his perjury. But the court held that defendant was not entitled to have his judgment vacated on account of any innocent mistake or want of recollection on the part of the plaintiff, nor even on account of the perjury of other witnesses. The judgment in this case rested entirely upon the perjured testimony of *Laithe*.

⁴⁸⁴ In *Graver v. Faurot*, 76 Fed. Rep. 257, the complainant brought a suit in equity in a state court, in which he charged two defendants with fraudulently inducing him to purchase some worthless shares of corporate stock, and, in accordance with chancery practice, required the parties made defendants to answer certain allegations or interrogatories in the bill under oath. The defendants answered. The answers were false and perjured, and the complainant suffered defeat. He subsequently discovered that the answers made by the defendants were false, and then brought suit to vacate the judgment. The court held that the making of the false answers was a positive and actual fraud, which vitiated the decree. It will be observed in this case that the judgment sought to be vacated was obtained by reason alone of the perjury of the two defendants in their answer to the interrogatories propounded to them. These cases cited by counsel have been examined because they seem to be more clearly in support of the principle that perjury of the successful party comes within the statute as fraud. But it will be observed that they are distinguished from the case at bar in this, that in each of them the judgment was based solely upon the perjury of the prevailing party. In the case at bar, there is other testimony to support the judgment than that of the respondent. The question propounded to respondent at the trial, if he had received any consideration for his becoming a surety, or any portion of the proceeds of the

note, was doubtless intended to go to the issue of suretyship. The fact whether he had received compensation for the accommodation would not primarily affect the issue of suretyship. We have seen no reason assigned why the compensation of a surety for his undertaking between himself and his principal would change the relation between the payee of the note and the surety. In other words, if it were true that Swalwell was paid by Walling ⁴⁸⁵ to become his surety, it would not affect the contract between appellant, as payee of the note, and Swalwell. It appears from the evidence subsequently discovered by appellant that Walling promised to pay Swalwell seven hundred and fifty dollars as the consideration for Swalwell becoming his surety on the note. It does not appear from the petition that this consideration had been paid, or that Swalwell had received any of the proceeds of the note. The answer of Swalwell to the question propounded to him, that he had not received any consideration for his becoming surety, is, to put the most favorable construction upon it, disingenuous and literal. It evaded directly answering the truth, and was misleading. But, if he had answered that he received a consideration, such answer alone could not have changed the result of the trial. In fine, the judgment did not rest upon the alleged false testimony.

2. But it is further assumed by the learned counsel for appellant that the writing discovered subsequently to the entry of the judgment was proof of the fact that Swalwell was a joint maker or principal upon the note, and the proposition is urged that, if the surety be indemnified by his principal in money or property to the value of the note, then the contract of suretyship is gone, and such indemnity makes the surety a principal, and he thus becomes directly liable to the payee of the note. It would seem, though not essential to the determination of this cause, that the proposition urged by counsel may be modified and conceded thus: That if the surety is fully indemnified in money or property of full value to the amount of the note, such surety is estopped from setting up against the payee of the note the defense that the time of payment has been extended in favor of the principal without the consent of the surety. The indemnity placed by the principal with the surety seems to be, in effect, a trust fund, which may be applied in payment of the amount due. ⁴⁸⁶ Perjury is not specified in our statute as a distinctive ground for vacating a judgment.

There must, at any rate, be connected with it such circumstances as will relieve the opposite party from all implication of want of diligence, and deceive him completely in the nature of the testimony. The statute of Minnesota makes perjury a cause for vacating a judgment, and in *Stewart v. Duncan*, 40 Minn. 410, the supreme court of that state observed, in reference to this law: "This statute is in derogation of the well-established and salutary principle and policy of the common law, which forbids the retrial of issues once determined by a final judgment."

The same court, in *Hass v. Billings*, 42 Minn. 63, observes: "Besides the reason that the act is in derogation of the common law, there is another reason for a strict construction, furnished by the consequences to which a large construction would lead. All who are familiar with the trial of causes know how ready the defeated party is, however full an opportunity he may have had to present his case, to charge that the result was brought about by false swearing and perjury of the successful party and his witnesses. That is often the feeling of the defeated party, especially where there is a direct conflict between the testimony on one side and that on the other."

In *Allen v. Currey*, 41 Cal. 318, where the opposite party was sworn as a witness, and knew of a fact which, if proved, would have given judgment to the other party, and failed to disclose it, the court said: "But it is quite evident that if a judgment could be set aside as fraudulent on such a showing as this, litigation would be interminable. If, on another trial, the plaintiff should still fail to maintain his case, he might, on the same theory, thereafter institute a new action on the discovery of additional evidence, and so on ad infinitum. If the losing party were permitted to assail the judgment ⁴⁸⁷ as fraudulent, on the ground that his adversary knew the facts to be as he claimed them to be at the trial and failed to disclose them, and that he has since discovered some additional evidence tending to prove them, a judgment, instead of being a 'final determination of the rights of the parties,' as defined by the statute, would be little else, in its legal effect, than an order to show cause why it should not be set aside."

In *Greene v. Greene*, 2 Gray, 361, 61 Am. Dec. 454, the supreme court of Massachusetts observes: "The maxim that fraud vitiates every proceeding must be taken, like other general maxims, to apply to cases where proof of fraud is admis-

sible. But where the same matter has been either actually tried, or so in issue that it might have been tried, it is not again admissible; the party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be controverted."

In *United States v. Throckmorton*, 98 U. S. 61, the United States supreme court said: "The doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed": See, also, 2 *Freeman on Judgments*, 4th ed., sec. 489; *Pico v. Cohn*, 91 Cal. 129, 25 Am. St. Rep. 159.

It cannot be the rule that a judgment can be attacked for fraud because in the trial the prevailing party defendant failed to voluntarily disclose the weakness of his defense, or some evidence which would tend to overthrow his defense. Ordinarily, the pleadings must determine what issues will be tried; and it has never seemed to be the practice that a party must disclose to his adversary what his testimony will be, or that he must suggest testimony for his adversary. Where interrogatories are propounded to the opposite party, he must answer, and answer truly. If his answer be false, as in the case in *Graver v. Faurot*, 76 Fed. Rep. 257, then ⁴⁸⁸ it may be fraud sufficient to vacate any judgment which such false answer supports. It will be observed in the case at bar that no questions were propounded to respondent relative to the question of indemnity of himself as surety. It would seem here that the complaint is that respondent did not voluntarily disclose to appellant that respondent was indemnified fully as surety. We cannot think it a safe rule to go so far as the position of appellant requires in this regard. The vacation of the judgment by the court is in the exercise of its sound discretion, and therefore, in view of the facts presented in the petition, and the caution which public policy demands in upholding a judgment in a case which has been fairly heard and in which full opportunity existed to determine its merits, we cannot answer that a case is made to authorize the vacation of the judgment.

The judgment of the superior court is affirmed.

Gordon, C. J., and Dunbar and Fullerton, JJ., concur.

JUDGMENT—VACATING FOR FRAUD—PERJURY.—A judgment obtained by fraud is binding on the parties until set aside in some direct proceeding: *Hollinger v. Reeme*, 138 Ind. 363, 46 Am. St. Rep. 402. It may be vacated by a suit in equity: See monographic note to *Furman v. Furman*, 60 Am. St. Rep. 649, treating of the vacating of judgments and decrees on motion when not specially authorized by statute; but the acts for which a court of equity may, on account of fraud, set aside or annul a judgment at law between the same parties have relation only to fraud, extrinsic or collateral to the matter tried by the first court, and not to fraud in the matter on which the judgment was rendered: *Camp v. Ward*, 69 Vt. 286, 60 Am. St. Rep. 929. This rule is based upon the principle that there must be an end of litigation: *Fealey v. Fealey*, 104 Cal. 354, 43 Am. St. Rep. 111. A judgment can be vacated, in equity, for perjury only in those cases where the perjury consists of extrinsic, collateral acts, not examined and determined in the former action: *Friese v. Hummel*, 28 Or. 145, 46 Am. St. Rep. 610. While there are a few decisions which are defensible only on the theory that an allegation of perjury, or subornation of perjury, may be sufficient to invoke the action of a court of equity against a judgment claimed to be due thereto, these decisions are contrary to the great weight of authority upon the subject: See monographic note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 218, 233, on relief in equity, other than by appellate proceedings, against judgments, decrees, and other judicial determinations, and to *Pico v. Cohn*, 25 Am. St. Rep. 165-171, on relief from judgments obtained by perjury. Compare *Munro v. Callahan*, 55 Neb. 75, 70 Am. St. Rep. 366. While the perjury of a plaintiff in testifying falsely upon an issue disclosed by the complaint will not, of itself, entitle the defendant to relief from a judgment procured thereby, if the acts testified to were not peculiarly or exclusively within the knowledge of the plaintiff, yet such perjury may be considered in connection with other circumstances tending to disclose a fraudulent scheme on the part of the defendant to put it out of the power of the plaintiff to defend the action, and as giving color to his prior acts, which are alleged to have been fraudulent: *Colby v. Colby*, 59 Minn. 432, 50 Am. St. Rep. 420. A mere failure of a prevailing party to disclose facts within his knowledge which, if known, would have prevented a judgment, is not such fraud as will justify relief, in equity, from the judgment, at the instance of the losing litigant: Note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 233; *Nye v. Sochor*, 92 Wis. 40, 53 Am. St. Rep. 896.

SMITH v. MITCHELL.

[21 WASHINGTON, 533.]

EQUITY—INJUNCTION—RIGHT TO JURY TRIAL.—An action to restrain one from obstructing a public highway, in which no damages are alleged or sought, is equitable in its nature, and it is proper to deny the defendant's demand for a jury trial there-in, though a jury may be impaneled as advisory merely.

NUISANCE—OBSTRUCTION OF HIGHWAY—SUIT BY PRIVATE PERSON TO ENJOIN.—Under a statute which authorizes a private person to maintain a civil action for a public nuisance, where it is specially injurious to him, he may maintain an action to enjoin the obstruction of a public highway as a public nuisance, where he owns a farm, orchard, and nursery adjacent to the road and there is no outlet to market for the products of his farm, orchard, and nursery, excepting by such highway.

HIGHWAYS—ESTABLISHMENT OF, BY PRESCRIPTION, OVER GOVERNMENT LAND.—The laws of the United States grant a right of way for the construction of highways over public lands, not reserved for public use, and, in the state of Washington, the establishment of highways by prescription is recognized. Hence, a highway in that state may be created by prescription or limitation over land held under a pre-emption or homestead claim and prior to patent by the United States.

Action by Smith against Mitchell. There was a decree for Smith, and Mitchell appealed.

J. T. Brown, for the appellant.

Trimble & Pattison, for the respondent.

⁵³⁷ GORDON, C. J. This action was brought by the respondent for the purpose of obtaining a perpetual injunction against appellant, restraining him from obstructing a public highway situate in Whitman county. The complaint alleges that respondent, in 1874, settled upon a quarter section of land adjacent to the alleged highway as a homestead, and has ever since that time continued to ⁵³⁸ reside thereon, and has perfected his title thereto; that at the time of his location the road in question was, and for a number of years prior thereto had, and ever since that time has been used by the public as a public highway leading into the town of Colfax, a portion of said highway running across land of the appellant. In brief, the complaint alleged the establishment of this highway by prescription or limitation. There was a demurrer to the complaint, which was overruled, and, upon issue of fact thereafter joined, the case came to trial. At the trial the appellant (defendant here) demanded a jury. The court ruled, however,

that the action was in equity, and impaneled a jury as advisory merely, and thereafter made findings and entered a decree in respondent's favor.

One of the assignments relied on for reversal is that the court erred in ruling that the action was equitable, and denying appellant's demand for a jury trial. No damages were alleged in the complaint or sought to be recovered by respondent in the action, and the ruling was correct.

Section 3092 of Ballinger's Code is as follows: "The remedies against a public nuisance are: Indictment (or information), a civil action, or abatement." The following section (3093) is as follows: "A private person may maintain a civil action for a public nuisance, if it is specially injurious to himself, but not otherwise."

Under these provisions of the statute, the court did not err in overruling the demurrer to the complaint on the ground that the respondent has no such interest as would enable him to maintain the action. Section 3093, *supra*, expressly authorizes an action by a private person when the nuisance complained of is specially injurious to himself; and in the complaint, in addition to what has been stated, it was alleged that the respondent was the owner of very valuable improvements, including an orchard and ³³⁹ nursery, upon a farm owned by him adjacent to the road in question, and had taken numerous orders for the sale of nursery stock; that there was no outlet to market for the products of his farm and nursery excepting by this highway; and in other respects brought himself, as we think, squarely within this provision of the statute.

A more important question is whether a prescriptive right can attach during a period while land is held under a pre-emption or homestead claim and prior to patent by the United States. The land of the appellant was patented to his grantor in 1880, and for many years prior thereto said grantor had been in possession of the land as a settler. The lower court found—and the finding is abundantly sustained by the evidence—that the road was first used as a public highway in 1872, and continued to be used as such, without any obstructions, until some time in the year 1882, when a gate was placed by defendant across such highway, but that the gate for a long time thereafter was not kept locked, and that in 1897 defendant not only securely fastened the gate, but he extended a barbed wire fence across said road. The court also found "that this road has been used as a public road or highway of

right by all people who desire to use it as such, and that such use was adverse, open, notorious, and continuous and without obstruction, until some time in the year 1882, and that such use extended over ten years." Appellant contends that no prescriptive right or right by limitation could begin while the land was government land, and that the statute of limitations would not begin to run, and user would not be adverse to the grantees of the government, until after the issuance of the patent; and counsel for appellant has cited numerous cases in support of this contention. Respondent bases his resistance to this contention upon section 2477 of the Revised Statutes of the United States, edition of 1878, which was enacted in 1866, providing ⁵⁴⁰ that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." This section is not construed or referred to in any of the cases cited by the appellant. Those cases either arose prior to the passage of the act of Congress just referred to, or in states wherein the establishment of public highways by prescription is not recognized. In this state the establishment of highways by prescription is recognized (*State v. Horlacher*, 16 Wash. 325), and roads may be established by use as well as by proceedings under the statute. It is a well-known fact that many of the public highways in this state had their inception in adverse user, which ripened into prescription. The act of Congress already referred to does not make any distinction as to the methods recognized by law for the establishment of a highway. It is an unequivocal grant of right of way for highways over public lands, without any limitation as to the method for their establishment, and hence a highway may be established across or upon such public lands in any of the ways recognized by the law of the state in which such lands are located; and in this state, as already observed, such highways may be established by prescription, dedication, user, or proceedings under the statute. Any other conclusion would occasion serious public inconvenience. If, after uninterrupted general use of a supposed highway for a long term of years, it was found possible, under the law, for any person owning land across which such highway might extend, to close the road to travel and force the public to await the outcome of the slow and tedious procedure provided by statute for the establishment of highways, the public welfare and convenience would be greatly impaired and retarded and serious damage and irreparable injury would follow. In the main, these highways had

their beginning at a time when all, or nearly all, of the ⁵⁴¹ adjacent land belonged to the general government. They are usually along the most accessible routes of travel and conform to the physical conditions of the country, and, when generally traveled by the public without interruption or hindrance for a period of ten years, they must be regarded as firmly established in law, as if formally established by proceedings under the statute. As was said by Judge Cooley, in *Flint etc. Ry. Co. v. Gordon*, 41 Mich. 420, in commenting upon this provision of the federal statute granting rights of public highway: "Such roads facilitate the settlement of the country, and benefit the neighborhood, and in both particulars they further a general policy of the federal government. But they also tend to increase the value of the public lands, and for this reason are favored."

Our conclusion upon this branch of the case is that the congressional grant includes and embraces any mode that is recognized for the establishment of the public highways, and carries with it whatever is necessary to make it effectual.

An examination of the record has convinced us that no reversible error was committed by the court in the admission or rejection of evidence at the trial, and the charge was in conformity with the principles of law herein recognized.

The decree is affirmed.

Reavis and Dunbar, JJ., concur.

Fullerton, J., not sitting.

EQUITY.—A JURY IN EQUITY CASES is not a matter of right in the parties: *Notes to Saint v. Guerrerio*, 81 Am. St. Rep. 827; *Kleinschmidt v. Greiser*, 43 Am. St. Rep. 657; *Maynard v. Richards*, 166 Ill. 466, 57 Am. St. Rep. 145; and there is no error in refusing a trial by jury in a suit purely of equitable cognizance: *Lane v. Schlemmer*, 114 Ind. 296, 5 Am. St. Rep. 621.

HIGHWAYS—OBSTRUCTION OF, IS A NUISANCE—SUIT BY PRIVATE PERSON TO ABATE.—A private action for a public nuisance is maintainable by one who suffers special injury therefrom: *Notes to Taylor v. Portsmouth etc. Ry.*, 64 Am. St. Rep. 221; *Morris v. Graham*, 68 Am. St. Rep. 36; *Baltzeger v. Carolina etc. Ry. Co.*, 71 Am. St. Rep. 796. The permanent obstruction of a highway is a nuisance: *Notes to Eau Claire v. Matske*, 39 Am. St. Rep. 901; *Evans v. Chicago etc. Ry. Co.*, 39 Am. St. Rep. 912; and where it actually obstructs public travel it may be abated at the suit of anyone who is specially injured thereby: *Notes to Farmers etc. Co. v. Albemarle etc. R. R. Co.*, 53 Am. St. Rep. 611; *Jackson v. Kiel*, 16 Am. St. Rep. 209; *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 818; *note to Woodman v. Metropolitan R. R. Co.*, 14 Am. St. Rep. 429.

HIGHWAYS—ESTABLISHMENT OF, BY PRESCRIPTION—GOVERNMENT LAND.—A public road may become a highway by prescription or limitation, but a road over government lands cannot be established by prescription, dedication, or limitation: See monographic note to *Whitesides v. Green*, 57 Am. St. Rep. 748, 762, on highways by user.

STETSON-POST MILL COMPANY v. BROWN.

[21 WASHINGTON, 612.]

MECHANIC'S LIEN—LEASEHOLD INTEREST.—If a lessee, acting for himself and not for the owner, causes a building to be erected on the leased premises, it is the leasehold interest only which is subject to a lien for material furnished or labor performed. Where the builder owns less than a fee simple in the land, then only his interest therein is subject to the lien.

MECHANIC'S LIEN—DOES NOT ATTACH TO FEE, WHEN—LEASEHOLD INTEREST.—Under a statute which gives to every person performing labor upon, or furnishing material to be used in, the construction of buildings, a lien on such buildings, whether performed or furnished at the instance of the owner of the property or his agent, and which makes any person having charge of the construction, alteration, or repair of any property subject to such lien, the agent of the owner for the purpose of establishing the lien, the fee cannot be subjected to a mechanic's lien incurred by a lessee, where the latter has been accorded the privilege of erecting a building on leased land, which building shall become the property of the lessor upon the termination of the tenancy, if such privilege is entirely optional with the lessee, and no enforceable contract respecting a building exists between the lessor and lessee.

MECHANIC'S LIEN—REPEAL OF STATUTE.—Section 1671 of Hill's General Statutes of the state of Washington, which provides that the owner of land may prevent a lien for labor performed or material furnished from attaching to it, for any improvement thereon for which he has not himself contracted, by giving notice that he will not be responsible therefor, is in conflict with section 2 of the act of 1893 (Laws of 1893, chapter 24, page 32), providing that if the builder owns less than a fee simple in the land to be affected by such a lien then only his interest therein is subject to the lien. The former act is, therefore, repealed by the latter one, which creates and provides for the enforcement of liens for labor and materials, which seems to be complete in itself, and which contains a repealing clause to the effect that all acts, or parts of acts, in conflict with its provisions are thereby repealed.

MECHANIC'S LIEN—MORTGAGE—PRIORITY.—If a lessee of premises who has, under the terms of his lease, the privilege of erecting a building thereon if he sees fit to do so, mortgages his leasehold interest, together with any building which he may subsequently erect on the premises, to secure the payment of money, which is used toward paying the cost of a building which he does erect, the lien of the mortgage is prior and superior to a subsequent lien for materials furnished and labor performed on the building.

John E. Humphries, William E. Humphrey, Harrison Bostwick, P. C. Ellsworth, and Charles E. Shepard, for the appellants.

Preston, Carr & Gilman and Bausman, Kelleher & Emory, for the respondents.

620 DUNBAR, J. This is an action by the appellants, Stetson-Post Mill Company et al., against Annie M. Brown et al., respondents, to recover judgment for materials furnished for the erection of a building, and also to foreclose mechanics' liens upon the building and realty.

On February 23, 1898, Amos Brown and his wife, Annie M. Brown, and James D. Lowman and his wife, Mary R. Lowman, were the owners of a certain lot situated in Seattle, and on that day they leased the same to Ida M. Cort. The lessee mortgaged the leasehold interest, together with any building which she should erect under the terms of the lease, to respondent Parsons, to secure the payment of money loaned her by him, which money was used toward paying the cost of the building. Thereafter the lessee commenced the erection on the premises of a brick building, which was designed to be three stories in height, but after the erection of the first story a temporary roof was put over the basement or first story and no further building was done. The lessee let a contract to one Jones to construct the building aforesaid, under the terms of which the lessee was to pay Jones in installments as the 621 work progressed. The contractor, Jones, bought lumber from the appellant Stetson-Post Mill Company, for use, and which was used, in the building, which lumber has not been paid for. The Seattle Gas & Electric Light Company furnished certain pipe fittings and light fixtures in the building, which have not been paid for. The intervenor McDougall performed certain labor in plastering the basement of the building, which has not been paid for. This labor was performed under contract with the lessee. The intervenors Brown and Westover, also under contract with the lessee, did the plumbing for the basement of the building, a part of which has not been paid for. The intervenor Viele, also under contract with the lessee, performed certain labor in painting, a portion of which only has been paid for. Intervenor Richards, under contract with the lessee, furnished certain materials and performed labor in placing the temporary roof on the building, a part of which only has been paid for. These several parties filed lien notices,

and the Stetson-Post Mill Company commenced this action against the respondents for foreclosure of its lien, the several other claimants intervening to enforce their lien claims.

The right of the several lien claimants to enforce their liens against the interest of the lessee in the premises is not disputed by the respondents, and they were awarded that right by the judgment of the court. The lien claimants, however, sought to impress their liens upon the fee; and it is also contended by them that their liens are prior to the lien of the mortgage in favor of Parsons. The court adjudged the lien of the mortgage a prior and superior lien.

It has been the uniform holding of this court, as indicated by the decisions in *Iliff v. Forssell*, 7 Wash. 225, *St. Paul etc. Lumber Co. v. Bolton*, 5 Wash. 763, *Mentzer v. Peters*, 6 Wash. 540, ⁶²² *Miles Co. v. Gordon*, 8 Wash. 442, and *Masow v. Fife*, 10 Wash. 528, that only the leasehold interest was subject to a lien for material furnished or labor performed. In fact, section 2 of chapter 24 of the Laws of 1893 (page 32), especially provides "that if such person [referring to the builder] own less than a fee simple in such land, then only his interest therein is subject to the lien." The contention in this case arises over the construction of the statute (*Balinger's Code*, sec. 5900), which provides that every person performing labor upon or furnishing material to be used in the construction of buildings, etc., has a lien upon the same for the labor performed or materials furnished by each respectively, whether performed or furnished at the instance of the owner of the property subject to the lien, or his agent; and provides, further, that every contractor, subcontractor, architect, builder or person having charge of the construction, alteration, or repair of any property subject to the lien as aforesaid shall be held to be the agent of the owner for the purpose of the establishment of the lien created. It is contended that the lessee in the case at bar was the agent of the owner for the construction of this building, and it is insisted that the case falls within the rule announced by this court in *Kremer v. Walton*, reported in 11 Wash. 120, 48 Am. St. Rep. 870, and afterward, upon rehearing, in *Kremer v. Walton*, 16 Wash. 139. In the first opinion rendered in that case it was held that, where a building had been erected and paid for by a lessee under an agreement that the lessor would repay the cost thereof by allowing the retention of rents by the lessee, the interest of the owner, as well as that of the lessee, was sub-

ject to lien for work and material furnished for the building. We think that case can easily and logically be distinguished from the one at bar. That decision was rendered upon a contract between the lessee ⁶²³ and lessor, which was introduced in evidence, or, rather, a letter, which contained the terms of the contract. There it was stipulated that the building which was to be erected by the lessee should be constructed under the supervision and subject to the approval of the lessor. The building was especially and minutely described and its value fixed, and it was specified that the building was to be paid for by the lessee by applying the rental against the cost of the same. It was upon these conditions, of the contract that that decision was rendered, and the court stated that if it had appeared that the building was to be erected by the lessee himself, his interest as such lessee would be all that could be subjected to the liens for work and materials furnished for said building: Citing *Miles Co. v. Gordon*, 8 Wash. 442. "On the other hand," said the court, "if, by the terms of the lease, the building was to be erected and paid for by the lessor, he would be the one who was erecting, even although the lessee was to have the direction and control of the erection. In our opinion, the terms and conditions of the lease were such that it must be held that the building was to be erected by the lessor."

It will be observed that the expression in the opinion, "even although the lessee was to have the direction and control of the erection," was purely obiter dictum, for, under the terms of the contract in that case, it was specially provided that the building was to be erected under the supervision and subject to the approval of the lessor. The court found that the contract of lease included an agreement between the lessor and lessee that the latter should erect for the former the building in question; that for that reason the interest of the lessor, as well as that of the lessee, was subject to the liens growing out of its erection, citing in support of its conclusion *Otis v. Dodd*, 90 N. Y. 336. That case is distinguished by the New York court of appeals in *Cornell v. Barney*, 94 N. Y. 394, where ⁶²⁴ it was held that, under a contract with the lessee for a building in process of construction by the latter, in pursuance of provisions in his lease by which he covenanted to erect a building on the demised premises of at least a specified value, and the lessor covenanted to loan a specified sum as the building advanced, to be secured by mortgage on the lessee's in-

terest, in the absence of evidence that the lessor had some connection with the above contract, plaintiff was not entitled to have or enforce a lien against the interest of the lessor in the land or building, but only against that of the lessee. Section 1 of the lien act applicable to the city of New York (chapter 379 of the Laws of 1875) was substantially the lien law of this state, which we are called upon to construe. The law which was construed by the New York court in *Otis v. Dodd*, 90 N. Y. 336, provided for a lien where a building was erected upon land with the consent of the owner, and the court held that it was a widely different statute from the one then in existence, which was passed in 1875 and is the one to which we have just referred.

When the case of *Kremer v. Walton*, 16 Wash. 139, was again before the court in 1896, the former ruling was upheld, and it was announced that the owner of the land may be charged with mechanics' liens, through the construction of a building thereon by a lessee, when the contract between landlord and tenant, while, in effect, a lease, at the same time was equivalent to a building contract authorizing the lessee to proceed with the construction as the agent of the owner. This decision was also based upon the letter, which was presumed to embrace the substance of the contract, together with some other evidence, which plainly showed that the lessor was acting not only with the consent, but under the direction, of the lessee. An entirely different state of affairs is shown by the lease in this case. The lease commences with the statement that "the lessors, in ^{and} consideration of the rents herein reserved and the covenants on the part of the lessee hereinafter contained, have demised and let," etc. It will be found that there are no covenants on the part of the lessee to erect a building. The lease provides a certain rent, which evidently did not take into consideration the value of any building for the erection of which permission was given. The terms of the lease were that rental was to be paid as follows: Two hundred dollars per month for each and every month of the first two years of the term; two hundred and fifty dollars per month for each and every month of the third year of the term; two hundred and seventy-five dollars per month for each and every month of the fourth year of the term; and three hundred dollars per month for each and every month of the fifth year of the term; six hundred dollars having been paid in advance. The permission to build is couched in the following language: "And the lessors

do further grant to the lessee the privilege to build on the premises described a brick building, the same to conform in kind and quality of material and dimensions of walls and construction of partitions to the ordinance of the city of Seattle known as the building ordinance."

There is a further provision that at the expiration, or sooner, if the lease is terminated for any cause, the lessee will quit the premises and yield and surrender possession thereof to the lessors; and if any buildings are erected upon the same, they shall remain a part of the realty and the property of the lessors, without payment or contribution. It is true that no sensible or right distinction can be drawn between a case where the lessor agrees to pay in cash for a building which is contracted to be erected upon the leased premises and one where the building is to be paid for either wholly in rent or by a diminution of the actual rental value. In either case the value of the building enters into the consideration of the lease and is an element of value which is considered. But that state of ~~case~~ facts does not exist in this lease. There is no particular building contracted for here. The lessee does not contract to erect a building of any kind. Her lease is perfect and enforceable up to the end of the time for which the lease is given, whether she erects a building or not. There is no basis in this lease for an action against her by the lessors either to shorten or annul her lease for not building, to compel her to build, or to obtain damages for her failure to build. She has in no way made herself responsible for a building, and even if the lease could be construed into a responsibility, the absence of specifications would render it a nullity. Under the terms of this lease, if it should be held that she was obligated to build at all, a building costing one hundred dollars would meet the requirements of the lease as well as a building which would cost one hundred thousand dollars. So that it must be held that the value of the building was in no sense an element which was taken into consideration in fixing the rental value.

A very ingenious argument is offered by the appellants in their reply brief, to the effect that courts must take into consideration the ordinary business sense of people who are entering into contracts, and that between the lines of this contract it can be read that the erection of the building and the use to be made of it was the real inducement to one party, and probably to both, and that such erection was intended when the lease was made, although it was stated as a mere privilege

and not as a covenant. It would be dangerous for courts in construing contracts to ignore the plain wording of the contract and speculate, by the aid of whatever business knowledge the court might possess, in relation to the supposed actual meaning of the parties, which they had not seen fit to express. If there are any hardships which are liable to be worked upon furnishers of material or labor through the enforcement of the law as it now exists, "it is better," in the language of the ⁶²⁷ appellate court of New York in the case of *Cornell v. Barney*, 94 N. Y. 394, to which we have above referred, "to leave any amelioration or improvement of the law which may be needed to the legislature, than by a forced and unnatural construction of the language used in this act to seek for a legislative purpose not apparently expressed." The same rule should apply to the construction of contracts.

It is contended that the case of *Miles Co. v. Gordon*, 8 Wash. 442, is not in point, but we think it is. It is true that in that case the lien was sought to be enforced for improvements made upon property which was already in existence, but the principle would be identically the same whether a newly erected building were to pass into the possession and ownership of the lessor or an old building, the value of which had been enhanced by improvements during the lease. It is insisted, in addition, by the appellants that the respondents in this case could escape liability in any event only by complying with the provisions of section 1671 of 1 Hill's Code, which provides that "should the owner or owners of any land desire to prevent the lien from attaching . . . he or they may do so by giving a notice in writing, posted in some conspicuous place upon said land or improvement, to the effect that he or they will not be responsible for said improvement," etc. We think that it was the legislative intention to repeal this statute by the act of 1893, chapter 24, page 32, creating and providing for the enforcement of liens for labor and material. In section 2 of this act is a proviso that, if such person own less than a fee simple in such land, then only his interest therein is subject to the lien. The act seems to be complete in itself, and the repealing clause is to the effect that all acts or parts of acts in conflict with the provisions of the act are thereby repealed. The provision in relation to the notice, it seems to us, is in conflict with the express provision in this act that, if such person own less than a ⁶²⁸ fee simple in such land, then only his interest therein is subject to the lien. In any event, this act has in many

cases been construed by this court against the contention of the appellants.

The further contention that the liens in this case were superior to the mortgage of Parsons was decided by this court adversely to the appellants' contention in *Home Sav. etc. Assn. v. Burton*, 20 Wash. 688.

No error having been committed by the court in any respect, the judgment will be affirmed.

Gordon, C. J., and Fullerton and Reavis, JJ., concur.

MECHANIC'S LIEN—LEASEHOLD INTEREST—BUILDING ON LEASED PREMISES.—A materialman's lien for making, altering, or repairing a building, under a contract made with the lessee of the premises, extends to the leasehold interest only: Note to *Kremer v. Walton*, 48 Am. St. Rep. 573. A mechanic's lien is ordinarily limited to the interest of the person for whom, or at whose instance, the materials were furnished or the labor performed: *Henderson v. Connelly*, 123 Ill. 98, 5 Am. St. Rep. 499; and cannot affect the rights of the owner of the land: Note to *Lyon v. McGuffey*, 45 Am. Dec. 679.

MECHANIC'S LIEN—MORTGAGE—PRIORITY.—A mortgage existing at "the inception" of a mechanic's lien is protected: *Oriental Hotel Co. v. Griffiths*, 88 Tex. 574, 58 Am. St. Rep. 790; *Farmers' Bank v. Winslow*, 3 Minn. 86, 74 Am. Dec. 740; *Russell v. Grant*, 123 Mo. 161, 43 Am. St. Rep. 563, and note. Compare *Mathwig v. Mann*, 96 Wis. 213, 65 Am. St. Rep. 47; *Jarvis v. State Bank*, 22 Colo. 399, 55 Am. St. Rep. 129.

CASES
IN THE
SUPREME COURT
OF
WYOMING.

DALEY v. ANDERSON.

[7 WYOMING, 1.]

TIME—COMPUTATION OF.—“MONTH” AND “CALENDAR MONTH.”—The word “month” as used in a statute means a calendar month, and the term “calendar month” means a month as designated in the calendar, without regard to the number of days it may contain.

TIME—COMPUTATION OF.—In computing time under statutes which require the first day to be excluded and the last included, a month from August 30th begins at the last moment of that day.

TIME—COMPUTATION OF.—A term of months expires on the day of the last month corresponding to the day of the month in which the term began, and if the last month has not so many days, then on the last day of that month.

APPEAL—COMPUTATION OF TIME FOR.—Under a statute requiring the petition on appeal to be filed within six months after the appeal is perfected, the statute is complied with if the appeal is perfected on August 30th, and the petition on appeal is filed on the following February 28th.

APPEAL—ENTRY OF JUDGMENT.—Entry is not essential to the validity of a judgment, but it is, as a general rule, a prerequisite to the right of appeal.

APPEAL—ENTRY OF JUDGMENT.—The judgment of the board of water control and the entry thereof in its records are separate acts, and the time in which an appeal from such judgment may be taken does not begin to run until the entry thereof in the records of the board.

APPEAL—TIME IN WHICH MAY BE TAKEN.—A statutory provision limiting the time of appeal is jurisdictional, and such time cannot be enlarged by the court nor by agreement of the parties, and if a notice of appeal is not filed within the time prescribed by law, the appellate court is without jurisdiction to entertain such appeal.

McMicken & Blydenburgh, for the plaintiff in error.

Lacey & Van Devanter, for the defendants in error.

* CORN, J. This case arises upon an alleged erroneous ruling of the district court of Carbon county in sustaining a motion of the defendants in error to dismiss an appeal taken by plaintiff in error from an order of the state board of control, determining the priorities and amount of appropriations of water from Separation creek in that county.

The order, as appears by a certified copy of it, was made June 3, 1893. The plaintiff in error filed his notice and undertaking on appeal under section 28, chapter 8, of the Laws of 1890-91, on August 30, 1893, and his petition under section 30 on February 28, 1894.

At the hearing the defendants in error presented their motion to dismiss the appeal for the reason "that plaintiff and appellant's petition in appeal was not filed within the time by law provided," and the district court sustained the motion and dismissed the appeal. The statute, section 28, chapter 8, of the Laws of 1890-91, provides that "the party or parties appealing shall, within sixty days of the determination of the board of control, * which is appealed from, and the entry thereof in the records of the board, file in the district court to which the appeal is taken, a notice in writing, stating, etc., and upon the filing of such notice the appeal shall be deemed to have been taken." Section 30 provides that the appellant shall, within six months after the appeal, as provided for in sections 27, 28, and 29, is perfected, file in the office of the clerk of the district court a petition setting out the cause of the complaint.

The first question presented is whether the filing of the petition on February 28, 1894, complies with the requirement of the statute that it shall be filed within six months after taking the appeal, August 30, 1893.

It is conceded, and our statute provides, that the word "month," when used in the statutes of this state, means a calendar month. The defendant in error contends that the period from August 30th to February 28th includes the six calendar months of September, October, November, December, January, and February, and one day, the 31st of August, in addition, and, it is argued, there being twelve calendar months in the year, that if six be taken away there must be six remaining. But that, deducting the six months from September to February, inclusive, and the last day of August, as in this case, the remainder would be one day less than six months, and

that consequently the period from August 30th to February 28th must be one day more than six months, and that therefore the filing was not in time, and that this fact is jurisdictional. This reasoning is ingenious, to say the least, and we have found no American case where the precise point is decided. We are referred, however, to the English case of *Migotti v. Colvill*, L. R. 4 C. P. D. 233, where the same reasoning was employed and the court decided adversely to the position of the defendant in error.

The real question is, What is the proper method of computing one or more calendar months? The term "calendar month" is used to distinguish it from the lunar month, and means a month as designated in the calendar, without regard to the number of days it may contain. In commercial transactions it means a month ending on the day in the succeeding month corresponding to the day in the preceding month from which the computation began. By our statute the first day is excluded and the last included, so that a month from August 30th would begin at the last moment of August 30th. And this is the reasonable and proper method of computation in all cases arising under our statute. But the confusion occurs in this case from the fact that the computation begins near the close of the month, and that the months are not of uniform length. The computation beginning on August 30th, it would probably not be questioned that two months would end with October 30th. And this would meet the demand of defendant's argument that after taking away two months there should be ten months remaining of the year. But it would seem equally clear that computing from the same date one month would end with September 30th. But in order to have eleven calendar months remaining and answer the demands of defendant's argument, the whole month of August must be included, and that would require that the 31st day of August be counted twice in the year—first, to make the one calendar month, and afterward to complete the eleven calendar months. And so, if the computation begin with August 28th it will not be questioned, I think, that six months would end with February 28th following. But in order to have six calendar months remaining, the whole of the months from March to August, inclusive, must be counted, and again three days at the end of August would need to be counted twice to make up the twelve calendar months. But if it be contended that the whole of the month of February having been exhausted in

completing the first six months, the computation of the last six months must begin with March 1st, then the first day of March, being excluded from the computation by the statute, would be entirely lost, and the last six months would be short by one day. I think these illustrations sufficiently show that it is impracticable to apply the 7 method of computation insisted upon by the defendants in error.

But if it be kept in mind that it is to be a computation by months and not by days, the difficulty of arriving at a reasonable and convenient rule in a great measure disappears. The rule approved by the English court in the case of *Migotti v. Colvill*, L. R. 4 C. P. D. 233, is, in substance, that the term of months expires on the day of the last month corresponding to the day of the month in which the term began, and if the last month has not so many days, then on the last day of that month. This seems to be the true and reasonable method of computation, and in cases under our statute the term does not expire until the last moment of the day. The petition filed on February 28th was therefore filed within six months from August 30th.

But it is further objected by the defendants in error that the notice of appeal was not filed within sixty days of the determination and entry thereof in the records as required by law. There is no direct evidence showing when the entry in the records was made. The determination as appears by the transcript of the record was made on June 30th. The transcript does not state when it was entered. Counsel for defendants in error insist that in the absence of any other showing it must be deemed to have been entered at the date of the determination. I do not think so. "Entry is not essential to the validity of the judgment, but it is as a general rule a prerequisite to the right of appeal": 1 Black on Judgments, sec. 106. The statute giving the right of appeal in this case follows the general rule, and provides that the appeal shall be taken "within sixty days of the determination of the board of control and the entry thereof in the records of the board." It clearly contemplates the two acts as separate, and that the time in which the appeal may be taken does not begin to run until the entry in the records. The only evidence in the case showing when it was entered is a recital in the undertaking on appeal executed by the plaintiff in error, which recital is: "Said determination and decree having ⁸ been made and entered in the records of the state board of control during the month of June, A. D. 1893."

Under any construction of this language it is an admission of the plaintiff in error that it was entered not later than June 30th. Excluding the first day and including the last, under the rule prescribed by the statute, there elapsed thirty-one days of July and thirty days in August, making sixty-one days from the entry to the filing of the notice of appeal, or one day more than the time allowed by the statute. "The time within which an appeal must be taken is fixed by law, and the appeal must be taken within the time designated. The provision which limits the time is jurisdictional in its nature. The time cannot be enlarged by the court nor by the agreement of the parties": Elliott's Appellate Procedure and Trial Practice, 111. It was intimated in the argument of the case in this court that for some reason this objection to the jurisdiction was not urged, and perhaps not presented, in the court below. That if it had been it would have been successfully met by the plaintiff in error. We have no knowledge of any circumstances which would have excused the failure of the plaintiff in error to file his notice of appeal within the time prescribed by the statute. The objection is made here, and seems to be covered by the general terms of the motion presented to the district court. It appears to this court that the notice was not filed in time, and that the court below was entirely without jurisdiction to entertain the appeal.

The judgment dismissing the appeal must therefore be affirmed.

Conaway, C. J., and Potter, J., concur.

TIME.—THE TERM "MONTH" at the common law means a lunar month, except in ecclesiastical affairs and as applied to commercial paper, but in this country it is understood to mean a calendar month: McGinn v. State, 46 Neb. 427, 50 Am. St. Rep. 617. In statutes and judicial proceedings the word "month" means a calendar month: Note to McGinn v. State, 50 Am. St. Rep. 626. See the extended note to Cressey v. Parks, 46 Am. Rep. 410-416, on computation of time.

APPEAL—ENTRY OF JUDGMENT.—An appeal from a judgment cannot be taken until it is entered: Durant v. Comegys, 2 Idaho, 809, 35 Am. St. Rep. 267; Oliver v. Wilson, 8 N. Dak. 590, 73 Am. St. Rep. 784.

APPEAL—TIME FOR.—The court cannot extend the time for appeal indirectly when such time is limited by statute: Bank of Monroe v. Widner, 11 Paige, 529, 43 Am. Dec. 768, and note.

DELLES v. SECOND NATIONAL BANK.

[7 WYOMING, 66.]

PUBLIC LAND—CANCELLATION OF ENTRY—COLLATERAL ATTACK.—The power of the land department of the government to cancel a public land entry for fraud can be exercised only after notice to and a hearing of the interested parties. Cancellation of such entry without a hearing is a nullity and may be collaterally attacked.

APPEAL—NECESSITY OF JUDGMENT.—The right to an appeal presupposes a judgment after a hearing, or an opportunity to be heard, and an appeal allowed from a judgment rendered without such hearing or opportunity must be dismissed.

Lacey & Van Devanter, for the plaintiff in error.

C. P. Arnold and N. E. Corthell, for the defendants in error.

“ POTTER, J. Plaintiff in error complains of a judgment of the district court for Albany county in favor of the defendants in error for the recovery of the possession of the southwest quarter of section four (4), in township sixteen (16) north, of range seventy-six (76) west, of the sixth principal meridian, located in the county of Albany in this state. Said lands were public lands of the United States, the strict legal title to which remained in the government, no patent having issued to anyone therefor.

The right of the defendants in error to the possession of the land was claimed by reason of final certificate from the United States upon a desert-land entry, including that tract with others, made by one Thomas J. Fisher and sundry mesne conveyances, which vested in them all the right, title, and interest of said Fisher under his said entry.

Plaintiff in error was in possession under a homestead entry, made February 15, 1894, for which he held receiver's duplicate receipt, and it was claimed on his behalf that the entry of Fisher had been canceled, and that there were no existing rights thereunder. To sustain that claim there was introduced in evidence, upon the trial, a letter of the assistant commissioner of the general landoffice to the register and receiver of the local landoffice, dated November 20, 1888, wherein it is stated that in June, 1877, Thomas J. Fisher applied to enter certain lands, including the tract in controversy, under the desert-land act, which application, being defective in form and unaccompanied by the payment required, “ was rejected and

returned to the applicant. That in the meantime on September 5, 1877, one Henry Carver filed a declaratory statement, No. 444, covering the land in controversy, alleging settlement August 10, 1877. That Fisher initiated a contest against the claim of Carver upon which a hearing was had, both parties appearing with witnesses February 19, 1878. That on April 19, 1880, Fisher made desert-land entry No. 197 for the land, and on July 3, 1880, the declaratory statement of Carver was canceled upon relinquishment. That April 29, 1880, the commissioner decided that according to the testimony adduced in the trial of February 19, 1878, the tract of land then in controversy was clearly shown to be nondesert in character within the meaning of the desert-land act, so that irrespective of other considerations, Mr. Fisher's entry is without foundation in fact or in law; and approved the action of the local office in rejecting the same in favor of Mr. Carver's declaratory statement, and advising the local office to notify claimant of his right to appeal. That February 16, 1883, the register reported that Mr. Fisher had taken no appeal upon his desert-land entry, No. 197. That April 9, 1883, final certificate was issued upon the same. The letter then proceeds as follows: "In view of the commissioner's decision, as above noted, based upon the evidence given during the trial, that the land embraced in D. L. E., No. 197, was not properly subject to entry under the D. L. act, said entry is therefore held for cancellation, and sixty days allowed for appeal. You will advise the party in interest of the contents of this letter, in accordance with the instructions contained in circular of October 28, 1886, copy herewith inclosed, and at the proper time report the result to this office."

There was introduced by the defendants in error a letter dated January 11, 1889, from the receiver of the local land-office to Mr. Fisher, referring to the above-mentioned letter of the commissioner, and notifying him of the effect thereof, and also a letter from the register to the same ⁷⁰ party, dated March 11, 1890, referring to the former letter, and notifying him of the effect of the same letter of the commissioner, and that he had sixty days from the receipt of such letter of March 11, 1890, to file his appeal from the decision of the commissioner of November, 1888. Subsequently, by letter of the register to the commissioner the registry return letter to Fisher uncalled for, and registry return receipt unsigned, was inclosed and transmitted to show service of notice, and the letter stated that no action had been taken in the matter. From the other

correspondence between the commissioner's office and the local office which we find in the evidence, it appears that June 17, 1890, the commissioner wrote the register and receiver stating that they had on May 28, 1890, reported for cancellation for expiration of statutory period the desert-land entry of Thomas J. Fisher, No. 197, F. C. No. 48, and that the entry "has therefore been this day canceled."

Upon these facts it is insisted that the entry of Fisher was duly canceled, and that neither he nor his grantees had thereafter any interest in the premises. The additional fact ought to be mentioned that, on the trial, it was sought to prove the death of Fisher some four or five years prior thereto, but the witnesses could only testify that they understood he had died "between four and six years ago."

As the decision of the commissioner of November 20, 1888, is entirely based upon the decision of April 29, 1880, which was rendered in course of the contest of Fisher against Carver, it would seem that the decision of the last-named date ought to have been produced, if, indeed, it is not a necessary part of the proceedings resulting in the final cancellation of Fisher's entry. As we read the proceedings, there appears to have been a misconception of the facts in the minds of counsel in some important particulars. In the first place, it is very evident that the contest initiated by Fisher against the claim of Carver was closed by the decision of the commissioner, April 29, 1880, approving decision of register and receiver; and that the letter of November, 1888, formed no part of the proceedings in that contest. It is also evident that in that contest no entry of Fisher was involved, for the reason that the trial was held in February, 1878, and his entry was not made until April 19, 1880. He may have, and probably did, at the time of initiating the contest, make an application to enter, but the entry was not received and made of record. Therefore, it is entirely clear that the decision of the commissioner, rendered April 29, 1880, had no reference whatever, and it would have been improper that it should have, to the entry of Fisher, No. 197, made April 19, 1880.

In addition to the fact that such entry could not, in the very nature of things, have been involved in the contest which was tried long before it was made, is the almost absolute probability, arising from the slight difference in time, that the fact that Fisher had made an entry which had been accepted but ten days before his letter of April 29, 1880, was not within the

knowledge of the commissioner. The apparent assumption of the assistant commissioner, in 1888, that the letter of April, 1880, had some application and reference to Fisher's entry No. 197, seems to have been without any possible foundation. The assistant commissioner states in his letter of November 20, 1888, that the declaratory statement of Carver was canceled by relinquishment July 3, 1880, but the date of that relinquishment is not disclosed either in the letter or by other evidence. We apprehend that it is probable it was executed before that date, and at such time that when Fisher made his entry in April, the fact of such relinquishment was known to the register and receiver, but whether or not that is so is doubtless unimportant.

It is also evident that if the local land officers reported the entry for cancellation on account of expiration of statutory period, they had no reference to the period for submitting final proofs, but to the expiration of the period for taking an appeal from the decision of the commissioner; ⁷³ but if they did refer to the matter of final proofs, they were in error as to the fact, final proofs having long before that time, and within the prescribed period, been submitted and received.

If the decision of the commissioner of November 20, 1888, was not a part of the contest proceedings of Fisher v. Carver, from what proceedings did it spring? We are not inclined, in the absence of an explanation to that effect in the letter itself, to view it as the result of a consideration of the final proofs upon which the final certificate had been issued. The letter was written five years later, and does not refer in any way to such proofs, and, as there is no evidence of any other hearing than that in the contest already alluded to, and that which necessarily occurs upon the production of the final proofs, and the letter itself bases its conclusions and judgment upon the decision of April 29, 1880, we are irresistibly led to conclude that, assuming the entry No. 197 to have been involved in the contest of 1877-78, and the entry rejected, it was found that the final certificate had nothing to stand on, and, therefore, as an independent act, the commissioner proceeded to hold the same for cancellation. In the view we are constrained to take of this case, the important feature connected with the letter of 1888 is the fact that the entry of Fisher, under which his rights and those of his grantees arose, had not been involved in any hearing with regard to its validity or the character of the land covered thereby. In the case of *Caldwell v. Bush*, 6 Wyo. 342, this

court held that after a hearing of which the entryman had notice, the land department of the government could cancel an entry for fraud, but that in such case a hearing and notice were necessary. Such is the law announced by the supreme court of the United States: *Orchard v. Alexander*, 157 U. S. 372; *Cornelius v. Kessel*, 128 U. S. 456.

The order of the department in respect to the land in controversy in November, 1888, was that Fisher's entry and final certificate should be held for cancellation, from ⁷³ which an appeal was permitted, and based upon that order and attempts to notify the entryman thereof, the final cancellation followed. It is obvious that there had been no hearing nor any attempt at one. Taking an appeal would not have brought out the facts. The right to an appeal presupposes a judgment to appeal from, and the judgment from which an appeal was allowed was rendered without a hearing of any kind.

The necessity for such a hearing is also recognized by the department of the interior. In the case of William A. Fowler, 17 Land Dec. 189, one Dailey made a homestead entry for certain land April 9, 1892, and Fowler thereafter, May 5, 1892, made a like entry for it. The commissioner of the general landoffice held the entry of Fowler for cancellation without a hearing. First Assistant Secretary Sims, in the course of an opinion rendered upon appeal from the decision of the commissioner, said: "While it is true that the entry of Fowler was improperly allowed by the local officers, yet, it having been made matter of record, it should not have been held for cancellation without notice to him and an opportunity given to show cause why the same should not be canceled. This course would have brought out the facts and established the rights of the respective parties to the land. . . . Your decision is set aside, and you will order a hearing as indicated, and upon a report of the register and receiver, you will readjudicate the case." We do not care to reiterate what was said in *Caldwell v. Bush*, 6 Wyo. 342, with reference to the authority of the land department and the jurisdiction of the courts in reference to the public lands. The whole matter was there discussed and the authorities reviewed. The view we take of this case is in conformity with the doctrines there announced.

If the land department has been only premature in its cancellation of the entry, and cause exists therefor, it can be shown upon hearing to be properly called for the purpose of determining that question, and it would seem by reference to the

decisions of the department of the interior ⁷⁴ that a grantee or mortgagee of the entryman can be notified, and can appear and be heard at such a hearing, if a notice of his rights has been properly given to the land officers. In our opinion upon the case before us, the commissioner was without authority to cancel the entry and final certificate of Fisher, and therefore those claiming under him are entitled to the possession of the land in controversy. The judgment of the district court awarding to them such possession was proper, and must be affirmed.

Conaway, C. J., and Corn, J., concur.

Public Lands—Right of Entryman to Notice and Hearing Before Cancellation of Entry.

It is undoubtedly true that if the commissioner of the general landoffice cancels an entry of public land without jurisdiction and without authority of law, such cancellation is a nullity and the entry is not affected thereby: *Perry v. O'Hanlon*, 11 Mo. 585, 41 Am. Dec. 100. In order that the government land officers may acquire jurisdiction and authority to cancel an entry on public land, notice to and a hearing or an opportunity to be heard must be given the entryman. Otherwise the action of the land officers in canceling the entry is a nullity, and may be collaterally attacked. This question has been so universally decided in this manner, when presented to the courts, that it only remains to enumerate the cases supporting the doctrine announced. Thus, in *Lewis v. Shaw*, 57 Fed. Rep. 516, it was decided that if an entry on public lands is allowed at the landoffice, and payment for the land is received, the entry is prima facie valid. Subsequent proceedings by the commissioner of the general landoffice and the secretary of the interior to cancel the entry for misrepresentations of the entryman, without notice to a purchaser in good faith from the entryman, are void. In such case the entryman or his bona fide purchaser has a vested right which cannot be divested without a hearing or an opportunity to be heard. An entry, though irregularly allowed for land not subject thereto, cannot be canceled without giving the entryman an opportunity to be heard in defense of his claim: *In re Piru C. Co.*, 16 Land Dec. 117; *Southern Pac. R. R. Co. v. Stillman*, 17 Land Dec. 111. An entryman cannot be deprived of his equitable rights in his entry without due process of law, and this implies notice and a hearing, but does not require that the hearing be in the courts, or forbid an inquiry and determination by the land department, but the cancellation of the entry by such land department can be made only after a hearing and due notice to the entryman, and any irregularity or informality in such notice is waived by a general appearance. If the appearance is not general, it is incumbent upon the entryman or those claiming under him to show that fact: *Caldwell v. Bush*, 6 Wyo. 342. This case

decides contrary to the rule laid down in *Lewis v. Shaw*, 57 Fed. Rep. 516, cited *supra*, that the entryman alone is the proper party to be notified of the hearing, as the land department is not bound to take notice of a conveyance by him after final proof and before patent issues.

The commissioner of the general landoffice has power generally to cancel entries for public lands. Such power is not arbitrary or unlimited, and must be exercised according to law, which includes notice to the entryman and a hearing or an opportunity to be heard: *Parsons v. Venzke*, 4 N. Dak. 452, 50 Am. St. Rep. 669; *Stimson v. Clark*, 45 Fed. Rep. 760; *Wilson v. Fine*, 40 Fed. Rep. 52; *Orchard v. Alexander*, 157 U. S. 372; *Cornelius v. Kessel*, 128 U. S. 457. The courts presume that the commissioner of the general landoffice, in canceling an entry for public land in an *ex parte* proceeding, has properly exercised his power, and the entryman must prove the contrary: *Parsons v. Venzke*, 4 N. Dak. 452, 50 Am. St. Rep. 669; *Darcy v. McCarthy*, 35 Kan. 722. Failure to require the filing of an affidavit, that the party to be served with notice of cancellation of an entry for public lands cannot be personally served, is not fatal to the power of the land department to act, upon publication of such notice, without personal service, provided such party has knowledge of such hearing and an opportunity to be heard, and if a special appearance to object to the jurisdiction is, after the objection is overruled, followed by a general appearance, the question of jurisdiction is not open to collateral attack: *Parsons v. Venzke*, 4 N. Dak. 452, 50 Am. St. Rep. 669. The commissioner of the general landoffice can cancel an entry for public land only when acting judicially, and he can only act judicially upon persons and matters over which he has acquired jurisdiction in the manner prescribed by law, which includes notice to the entryman or an opportunity to be heard: *Risdon v. Davenport*, 4 S. Dak. 555. In *Guaranty Sav. Bank v. Bladow*, 6 N. Dak. 108, it was decided that the fact that the mortgagee of the holder of a patent certificate may not have had notice of the proceedings to cancel such certificate, or any opportunity to be heard therein, does not render void the action of the land department in canceling such certificate, but merely entitles him to a hearing on the question of the legality of the original entry in a proper action in court, and then the burden of proof is upon him to make out a *prima facie* case.

The land department of the government is a tribunal appointed by Congress to hear and determine all questions of fact arising between conflicting claimants to public lands, and when such questions are finally decided by the officers of that department after a hearing or an opportunity to the parties to be heard, the decision is conclusive everywhere else, as regards all questions of fact, and cannot be attacked in the courts. In other words, decisions of the general land department on questions of fact involved

in the cancellation of entries for public lands are binding on the courts if the parties have been heard, or have had an opportunity to be heard: *Parsons v. Venzke*, 4 N. Dak. 452, 50 Am. St. Rep. 669; *Justice Min. Co. v. Lee*, 21 Colo. 260, 52 Am. St. Rep. 216; *Steel v. Smelting Co.*, 106 U. S. 447; *German Ins. Co. v. Hayden*, 21 Colo. 127, 52 Am. St. Rep. 206; *Davis v. Weibbold*, 139 U. S. 507-530; *Hosmer v. Wallace*, 47 Cal. 461; *Dilla v. Bohall*, 53 Cal. 709, 114 U. S. 47; *Rutledge v. Murphy*, 51 Cal. 388; *Moore v. Robbins*, 96 U. S. 535. The decisions of the land department officers upon questions of law or fact after notice and a hearing, or an opportunity to be heard, are not subject to collateral attack. Upon questions of fact their decisions are conclusive upon all parties, and upon questions of law their decisions can only be reviewed in a proper case made in a direct proceeding for that purpose: *Aurora Hill Min. Co. v. 85 Min. Co.*, 34 Fed. Rep. 515; *Shepley v. Cowan*, 91 U. S. 380. It is only when it is clearly shown that the officers of the land department have, by mistake of law, deprived a person of land, to which he is rightfully entitled, that a court is justified in a direct proceeding in setting aside the action of the land department: *Moss v. Dowman*, 88 Fed. Rep. 181; *Moore v. Robbins*, 96 U. S. 530; *Marquez v. Frisbie*, 101 U. S. 473; *Quimby v. Conlan*, 104 U. S. 420.

ESTATE OF BEARD.

[7 WYOMING, 104.]

CORPORATIONS—INSOLVENT NATIONAL BANK—LIABILITY OF STOCKHOLDER—PREFERENCES.—The statutory liability of a stockholder of a national bank to pay toward its debts a sum equal to the face value of his stock, is not entitled to preferential payment out of the funds of the insolvent debtor.

CORPORATIONS—INSOLVENT NATIONAL BANK—LIABILITY OF STOCKHOLDER—PREFERENCES.—If a stockholder in a national bank dies subsequent to the insolvency of the bank, but before any assessment is made on his stock on account of such insolvency, and after his death an assessment equal to the full value of his stock is made upon the administrator of his estate, and when his estate is insolvent, such assessment is not entitled to be given a preference over the claims of the general creditors of the estate.

ESTATES OF DECEDENTS—PREFERENCES.—Although the entire assets of an intestate are held by the administrator in trust for the payment of the debts of the intestate, this does not give to any particular debt preference in payment over any other debt.

CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDER—PREFERENCES.—The assets of an insolvent stockholder in an insolvent national bank, whether living or dead, are

not, as against his other creditors, subject to a preferential claim for the payment of his statutory liability for the debts of the bank for an amount equal to the par value of his stock.

Burke & Fowler and E. J. Churchill, for the receiver.

Clark & Breckons, for the administrator.

J. W. Lacy, for the contesting creditors.

¹⁰⁰ CONAWAY, C. J. The intestate left an estate insufficient to pay his debts in full. He was a stockholder in the Cheyenne National Bank, an insolvent corporation, now in the hands of Joel Ware Foster, as receiver. Intestate was liable under the laws of the United States upon the subject of banking for the debts of the corporation to an amount equal to the par value of his stock in the corporation. This liability survives against his estate. The amount is fixed by the judgment and decree of the United States circuit ¹¹⁰ court for the district of Wyoming at six thousand one hundred and thirty-nine dollars and ninety-three cents, and this amount is not in dispute. But Foster, as receiver of the Cheyenne National Bank, claims that this liability constitutes a preferred claim against the estate. He filed his motion in the district court for Laramie county, a court of probate jurisdiction, and having jurisdiction of this estate, that the administrator pay to him this claim in full without regard to the assets and other liabilities of the estate, "for the reason," as stated in the motion, "that said claim aforesaid is a trust fund and no part of the general assets of said estate."

In the brief filed on behalf of the receiver this proposition is stated in somewhat different language. It is claimed that the statute establishing the stockholder's liability "creates from his estate a trust fund for the payment of the debts of the bank," and, further, that the decree of the United States circuit court was based upon the ground that the statutory liability of the stockholder "created and carved from his assets a trust fund for the payment of the debts of the bank, and that, therefore, the assets of the decedent to the amount of this guaranty or fund constituted in fact no part of the general assets of the decedent's estate, but are trust funds, dedicated to the payment of this liability."

Upon the hearing of this cause in the district court, upon the motion of the receiver for preference in payment, that court found that important and difficult questions arose in the

cause, and upon its own motion, and with consent of all parties, reserved and sent to this court for decision such questions. They are three in number:

1. Does the statutory liability of a stockholder of a national bank to pay toward its debts a sum equal to the face value of his stock create from his assets a trust fund for the payment of the debts of the bank?

2. Is the liability created by the statute mentioned in the last question entitled to preferential payment out of the funds of the insolvent debtor?

3. Where a stockholder of a national bank dies subsequent ¹¹¹ to the insolvency of the bank, but before any assessment is made on his stock on account of such insolvency, and after his death an assessment equal to the full value of his stock is made upon the administrator of his estate, and where his estate is insolvent, should such assessment be given a preference over the claims of general creditors?

It is not questioned that the entire assets of the intestate are held by the administrator in trust for the payment of the debts of the intestate. But this of itself does not give to any particular debt preference in payment over any other debt. The claim urged on behalf of the receiver is that the liability of intestate upon his bank stock is entitled to preference.

Under section 5152 of the United States Revised Statutes, the administrator is not personally liable on account of this stock, but the estate and funds of intestate in his hands are liable in like manner and to the same extent as the intestate would be, if living. It is not questioned that the principles involved are the same as if the liability of intestate had been for unpaid subscription upon his capital stock.

One authority states the "trust fund" doctrine in such cases as follows: "It is a favorite doctrine of American courts that the capital stock and other property of a corporation is to be deemed a trust fund for the payment of the debts of the corporation, so that the creditors have a lien or right of priority of payment on it, in preference to any of the stockholders of the corporation": *Thompson on Liability of Stockholders*, sec. 10.

It is apparent that the doctrine must have a much more extensive application than this to sustain the claim of the receiver in the case at bar. In a note to the section quoted the learned author says: "I have not found a similar statement of doctrine in any book of English reports. The idea appears

first to have been formulated by the fertile brain of Mr. Justice Story, in *Wood v. Dummer*, 3 Mason, 308, decided in 1824." But the case ¹¹² of *Wood v. Dummer*, 3 Mason, 308, has been extensively followed by both federal and state courts, and the doctrine of that case is, perhaps, now too firmly established in America to be denied. The case was a bill in equity, brought by some of the creditors against some of the stockholders of the Hallowell and Augusta bank, and sustained on the ground of the impossibility of bringing into the suit all the parties interested. There was a recovery against the stockholders, the "trust fund" doctrine being announced, as it appears, for the first time. No question of priority of payment arose.

A good statement of the result of the cases upon this branch of the law of the liability of stockholders is given in 23 American and English Encyclopedia of Law, at page 855, in these words: "The liability of members of a corporation is founded on statute. But in the modern stock corporation, where membership is usually acquired by entering into the contract of subscription, each member may be said to assume the obligation to pay to the company the full amount named in his contract, i. e., he agrees to pay the corporation only, and the satisfaction of its claim in any manner acceptable to it discharges him from further liability. But the American courts of equity have evolved the doctrine that by the act of subscription one becomes liable for the full amount thereof to corporate creditors as well as to the corporation; that all who deal with the latter have a right to rely upon the total amount subscribed as a security for their claims—in a word, and in the language of the courts themselves, that unpaid subscriptions are a 'trust fund' for the payment of creditors. While in its origin this doctrine is distinctively American, and does not obtain in England, yet by statute a limited application of similar principles is there allowed. The more recent applications of the doctrine have been subjected to considerable criticism in this country."

This statement of the law is sustained by numerous citations of cases, and is followed by a discussion of the applications of the doctrine. But nothing appears to ¹¹³ indicate that it has ever been applied to give to the stockholder's liability for unpaid subscriptions for stock a preference in payment over other debts of the stockholder. Neither have counsel cited a case in which such application of the "trust fund" doctrine has been made; neither has such a case fallen otherwise under our observation.

In the case of *Thompson v. Reno Sav. Bank*, 19 Nev. 242, 3 Am. St. Rep. 883, it was held that it was not necessary to present to the executor or administrator of a deceased stockholder a claim for unpaid subscription to the capital stock of the bank before bringing an action thereon, although the statute provided that no holder of any claim against the estate of a decedent should maintain an action unless such presentation had first been made. The following reason is given in the opinion of the court: "The stockholders are trustees of the creditors, and suits to establish and enforce the trust are maintained against the representatives of deceased persons upon the theory that the decedent held money equal to the amount of his unpaid subscription, in trust for the creditors, and that the fund, although incapable of identification, has passed into the hands of the executor or administrator. Such a fund is properly no part of the estate of a deceased person. The deceased stockholders were trustees, and not debtors, of the bank's creditors."

The doctrine of this case fully sustains the contention of the receiver. If the administrator has taken possession of any money or property that did not belong to the intestate and did belong either to the bank or its creditors, he should deliver such money or property to the receiver who represents both the bank and its creditors. But no trust fund in money and no trust property ever passed into the hands of intestate from any source. The trust is purely constructive. The fund is purely constructive. It may have no existence in fact. The stockholder may have neither property nor money, but his debt to the corporation for unpaid subscription for stock is held to be a trust fund. The corporation, according to the ¹¹⁴ American doctrine, may not release the debt to the prejudice of its creditors without payment in full. If the corporation does release the stockholder without full payment, the creditors of the corporation may resort to the stockholder for payment to the extent of the stockholder's liability for unpaid subscriptions. To this extent the cases go, and some seem to go further. But I do not find any case that goes to the extent of charging the property of a stockholder with a trust or lien on account of his unpaid subscriptions for stock.

The doctrine of the Nevada case, however, would lead to that result. It was a suit in equity by a judgment creditor of an insolvent corporation to subject unpaid subscriptions for stock to the payment of his debt. Two of the defendants were

representatives of deceased stockholders. Of the conclusion that the statute requiring claims to be presented to the executors or administrators of deceased persons before suit did not apply in that case, one commentator says: "It is believed that this conclusion cannot be maintained upon principle. The rule which allowed a trust fund to be followed from hand to hand and recovered is believed to apply only in cases where the fund is earmarked, or separated from the remainder of the estate of the trustee in such a manner that it can be identified": Thompson on Law of Corporations, sec. 3328. And this suggests the question which must arise in every case under the doctrine of the Nevada court: What portion of the property of the stockholder constitutes the trust fund which is properly no part of his estate? Does the trust attach to all of his property? Does anyone purchasing his property with knowledge of his indebtedness to a corporation for unpaid subscription for stock take the property subject to the trust?

No court has answered these questions directly, because no court has made the application of the trust fund doctrine urged on behalf of the receiver in the case at bar. And, on the other hand, it must be said that no court has ¹¹⁵ ruled directly against this application of the doctrine. It seems that none of the courts have been called upon to rule directly upon the exact question presented here. The application of the trust fund doctrine claimed here is evidently a new application of that doctrine.

The case of *Peters v. Bain*, 133 U. S. 670, cited by counsel, has, however, a direct bearing upon the question under consideration. Bain & Brothers were directors and stockholders to a large amount in the Exchange National Bank of Norfolk. The bank was insolvent. Bain & Brothers were insolvent. They made an assignment of all of their property for the benefit of their creditors. Peters, receiver of the Exchange National Bank of Norfolk, brought the action by bill in equity to set aside the assignment, and subject the assigned property to the payment of debts due the bank. The liability of the Bains on account of their stock is considered, beginning at page 691, opinion of Chief Justice Fuller. The validity of the deed of assignment and the trust fund doctrine are disposed of in the following language: "Counsel contends that the deed was in contravention of sections 5151 and 5234 of the Revised Statutes of the United States, which provides that the shareholders of every national banking association shall be held

individually responsible for its debts to the extent of the amount of their stock, and additional thereto, and that the comptroller can enforce that individual liability. It is insisted that the capital stock is a trust fund of which the directors are the trustees, and that the creditors have a lien upon it in equity; that this applies to the liability upon the stock of a national bank; and that no general assignment of his property for the payment of his debts can lawfully be made by a shareholder, certainly not when he is a director. Undoubtedly, unpaid subscriptions to stock are assets, and have frequently been treated by courts of equity as if impressed with a trust *sub modo* in the sense that neither the stockholders nor the corporation can misappropriate such subscriptions so far as creditors are concerned: ¹¹⁶ *Richardson v. Green*, 133 U. S. 30, 44. Creditors have the same right to look to them as to anything else, and the same right to insist upon their payment as upon the payment of any other debt due to the corporation. The shareholder cannot transfer his shares when the corporation is failing, or manipulate a release therefrom for the purpose of escaping his liability. And the principle is the same where the shares are paid up, but the stockholder is responsible in respect thereof to an equal additional amount. There was, however, no attempt to avoid this liability, and the fact of its existence did not operate to fetter these assignors in the otherwise lawful disposition of their property for the benefit of their creditors."

This needs no comment. It appears to leave no room for the application of the trust fund doctrine to the extent of giving to the receiver or to the creditors of an insolvent corporation preference in payment from the estate of an insolvent stockholder as against the general creditors of such stockholder, whether he be living or dead. The trust evidently can have no greater effect on the property in the hands of an administrator than in the hands of the assignee.

Of the three questions submitted, the first is answered "yes," to the extent indicated in this opinion. The second and third are answered in the negative.

Potter, J., and Corn, J., concur.

CORPORATIONS — LIABILITY OF STOCKHOLDERS — PRIORITIES.—In separate actions by creditors of corporations to enforce the statutory liability of stockholders for the corporate debts, the creditor first suing thereby acquires a priority over other

creditors with respect to the stockholder sued. But when the proceedings are in equity, there can be no priorities among creditors: Monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 869, 870. See this note, pages 806-873, for an extended discussion of the liability of stockholders for the corporate debts.

STATE v. SWAN.

(7 WYOMING, 166.)

STATUTES—ENACTMENT OF—RIGHT TO RESORT TO LEGISLATIVE JOURNALS TO IMPEACH STATUTE.—Courts may consult the legislative journals in reference to a matter which the constitution expressly requires to be recorded therein concerning the procedure for the passage of the act, and if, upon such examination, it affirmatively appears, in respect to such requirements, that the bill did not in fact pass the legislature, or did not receive the constitutional majority, and therefore did not constitutionally become a law, such journals may be used to impeach the enrolled act, although the latter is signed by the presiding officers of both houses of the legislature, and carries the approval of the governor.

STATUTES—ENACTMENT OF—PRESUMPTION—EVIDENCE.—The presumption is that a statute found properly signed by the presiding officers of the legislature, approved by the governor, and deposited in the office of the secretary of state with the other acts of the session, was properly passed, which may be overcome only by evidence of which the courts take judicial notice showing the contrary; but, whenever the existence of a statute is called into question, the court may resort to any source of information capable of conveying to the judicial mind a clear and satisfactory answer to such question, and the legislative journals showing the final action of the legislature upon the final passage of such statute constitute a record, which may be resorted to, and which, by an affirmative showing to the contrary, is competent to overthrow the presumption arising from the certificates of such presiding officers, and the lodgment of the enrolled act with the secretary of state.

STATUTES—ENACTMENT OF—JOURNALS OF LEGISLATURE AS EVIDENCE TO IMPEACH.—The court has authority and it is its duty to examine the legislative journals to determine whether or not the statute in question was passed by a majority of the members elected to each house as required by the constitution, and if such journals affirmatively disclose that one section of such statute as enrolled and published did not finally pass either branch of the legislature, and did not pass by a majority of the members elected to each house, such section is not a law and must be adjudged void.

STATUTES—ENACTMENT OF.—If a section of an act passed by the legislature as disclosed by the legislative journals is not copied in the enrollment, and does not receive executive approval, it does not become a law.

STATUTES.—THE INVALIDITY OF ONE SECTION of a statute which is in material relation to other portions thereof, so as to modify, restrict, or extend its application, invalidates the whole statute.

E. W. Mann, for the relator.

R. W. Breckons, for the respondent.

¹⁷⁰ POTTER, C. J. In this case the relator, the city of Cheyenne, filed its petition in the district court for the county of Laramie, alleging its character as a municipal corporation, and that prior to the first day of March, 1897, it was allowed by the laws of the state of Wyoming to collect the taxes due to itself for municipal purposes, and, among other things, to sell real estate within its corporate limits upon which such taxes had become delinquent in the manner provided by the laws of the state of Wyoming, and by its own ordinances; but on the first day of March, A. D. 1897, there was approved by the governor an act passed by the fourth state legislature entitled, "An act relating to the sale of real estate for delinquent taxes, and fixing the fees to be charged therefor," which said act appears in the published session laws of the said fourth legislature as chapter 56 thereof. That according to the provisions of said act, it was made the duty of the county treasurer, on the first Monday in November in each year, at his office, to offer at public sale all lands on which the taxes levied for state, county, village, city, school district, or other purpose for the previous year should still remain unpaid, and that said act repealed all other acts inconsistent therewith.

It is then alleged that a demand had been duly made upon the defendant by the relator that he should advertise for sale in the manner provided by law, and that at the time provided by law he should offer for sale all lands within the corporate limits of relator upon which the taxes for the year 1896 and previous years duly remained ¹⁷¹ unpaid; and that the defendant, the county treasurer of Laramie county, refused to advertise the said lands for sale for said taxes. The prayer of the petition is for a writ of mandamus commanding the said county treasurer to comply with the provisions of the act aforesaid as the same appears in the published laws of the fourth legislature, so far as the taxes due to the city of Cheyenne for the year 1896 and previous years are concerned.

The respondent resists the application for mandamus on the grounds as set forth in the answer, that the act under which it is made his duty to sell lands for delinquent city taxes did not receive the vote of a majority of all the members elected to each house of the fourth legislature; that it was never placed upon its final passage in both houses; that there was no vote

taken by ayes and noes upon the final passage of such act; and because the names of those voting thereon in the fourth legislature were not entered upon the journals of said legislature.

An agreed statement of facts was filed upon which the case was submitted, and thereupon the district court reserved to this court for its opinion certain questions, found to be important and difficult, as follows:

1. In the state of Wyoming, can the journals of the house and the senate of the state legislature be resorted to for the purpose of declaring invalid an act of the legislature signed by the presiding officers of both houses and approved by the governor, and if so, to what extent?

2. Is section 1 of chapter 56 of the laws of the year 1897, as the same appears in the bound volume of the laws of said year, valid?

3. Is any part of section 1 of chapter 56 of the laws of the year of 1897, as the same appears in the printed volume of said act, valid, and if so, what part or parts?

4. Are sections 2 and 3 of said act valid?

5. Is it the duty of a county treasurer in the state of Wyoming to sell all lands on which the taxes ¹⁷² levied for state, county, or city purpose remain unpaid?

6. When is the treasurer of a county in the state of Wyoming compelled to sell property for delinquent taxes?

7. In selling property for taxes due the county or city has the treasurer of a county in the state of Wyoming the right to sell property for taxes due for previous years?

The questions reserved and the matters at issue in the action involve in the first place an inquiry into the validity of section 1 of the act aforesaid, as published in the session laws, and known as section 1 of chapter 56 of said published laws. In the agreed statement of facts which we find to conform to the showing made by the journals, the action of the legislature which finally resulted in the enrolled bill which was approved by the governor, thus creating the purported act aforesaid, is shown to have been as follows:

On the twenty-third day of January, 1897, there was introduced in the house of representatives "A bill for an act relating to the sale of real estate for delinquent taxes, and fixing the fees to be charged therefor," which title, it will be observed, corresponds exactly with the title of chapter 56, aforesaid. Said bill was designated as house bill No. 40. On January 29th, section 1 of said bill was amended in the

house of representatives; on February 2d, the said bill passed the house of representatives as amended, the voting being taken by ayes and noes, and the names of those voting thereon being entered on the journal showing that thirty of the members of the house had voted in favor of the passage of the bill, that three had voted against it, and that five members were absent. The journal therefore shows that the bill had regularly passed the house, receiving a vote of a majority of all the members elected thereto, and that the vote taken upon its passage was by the ayes and noes, and the names of those voting thereon were entered upon the journal.

¹⁷³ The bill was then transmitted to the senate, and in that body on February 9th, section 1 of the bill as it had passed the house was amended by striking out all of the section, and inserting in lieu thereof an entirely different section, making several material alterations, the main difference being that in the section as amended by the senate it was made the duty of the county treasurer to sell lands upon which there were unpaid and delinquent taxes due to any city within the county as well as to sell lands for delinquent taxes of state and county. On February 11th, the bill as thus amended passed the senate by a majority vote of all the members elected thereto, the vote being taken by the ayes and noes, and the names of those voting thereon being entered upon the journal, showing nineteen votes for the passage of the bill as amended, being all of the members of the senate. The bill so amended was then returned to the house, and on February 11, 1897, the house by a vote taken by ayes and noes, which was entered upon the journal, refused to concur in the senate amendment, and requested the senate to recede therefrom, twenty-six members of the house voting not to concur, three in favor of concurrence, and nine absent. On February 11th, the senate by a vote refused to recede from its amendment, and a conference committee was appointed by both senate and house to confer over the differences between the two bodies with reference to section 1 of said bill.

On February 17th, the conference committee presented to both the senate and the house the following report, which is copied in the journals of both the senate and the house, to wit:

"Cheyenne, Wyo., Feb. 16, 1897.

"Mr. Speaker: Your joint conference committee to whom was referred H. B. No. 40, beg leave to report as follows:

"We recommend that the senate recede from its amendments to said bill, and we further recommend that the ¹⁷⁴ following section, as section 1 of said bill be adopted and said bill be amended by striking out all of section 1 of said original bill and inserting in lieu thereof the proposed section, to wit:

"Section 1. The sales of real estate by all county treasurers in the state of Wyoming for nonpayment of taxes shall be held at the front door of the courthouse (or county building), beginning on the first Monday in October of each year, between the hours of 9 o'clock in the forenoon and 5 o'clock in the afternoon, and may adjourn from day to day (Sundays excepted), until all the lands are offered. After the tax sale as herein provided shall have closed, any real estate remaining unsold for the want of bidders therefor, the county treasurer is authorized and required to sell the same at private sale to any person who offers to pay the amount of taxes, penalties, interests, and costs thereon, and to make to such person such certificate as shall be required by law to be made and delivered as in the case of the sale of any such lands at public sale, with the additional statement inserted therein that such lands have been offered at public sale for taxes, but not sold for want of bidders, and sold for taxes by private sale, and the treasurer is further authorized and required to sell as aforesaid all real estate in his county on which taxes remain unpaid and delinquent for any previous year or years; provided, that all sales of real estate for the unpaid taxes due thereon to any such city, town, or village in the state of Wyoming by the treasurer of any such city, town, or village shall be governed by the provisions of this act.

ISAAC BERGMAN,

"L. C. TIDBALL,

"THOMAS COTTLE,

"House Committee.

"A. M. APPELGET,

"GEORGE W. FOX,

"Senate Committee."

¹⁷⁵ The above is taken from the house journal. In the printed journal of the senate the report of the conference committee is shown to be precisely the same as the above, with the exception that the word "such" preceding the word "city" where it is first used toward the close of the provision of section 1 as recommended by the committee is omitted.

On February 17th, upon the coming in of said report, a motion was made in the house to adopt the report of the joint conference committee and that the amendments recommended by such committee be concurred in. Thereupon the vote was taken by ayes and noes, with the result that thirty-four voted in favor of the motion to concur in such amendment of the conference committee, three opposed thereto, and one was absent; the names of those voting thereon were entered on the journal of the house, and the speaker thereupon announced that the amendment of the conference committee had been concurred in by the house. On the same day in the senate a like motion was made, and upon a vote of the members of the senate taken by the ayes and noes it appears that sixteen voted in favor of the motion to adopt the report of such committee and concur in such amendment, and three were absent, there being no votes in the negative. The names of those voting upon such motion in the senate were entered upon the senate journal. On February 19th, the act was enrolled; but section 1 of the act as enrolled was not the section which was recommended by the conference committee and which was adopted and concurred in by both house and senate on February 17th; but was the amendment first made by the senate which was rejected by the house. The enrolled act was signed by the speaker of the house and the president of the senate and sent to the governor, and the same was approved by him and became chapter 56 of the printed volume of the laws of 1897.

The question before us, therefore, is whether or not the courts may go behind the enrolled act which is authenticated by the signature of the presiding officers of the two ¹⁷⁶ legislative bodies, and approved by the governor, to determine whether or not such enrolled act is in fact the act which was passed by the legislature.

There is some conflict among the authorities upon this proposition; some courts going to the extent of holding that the courts are at liberty to resort to the legislative journals to discover whether or not in any instance the constitutional requirement has been complied with in the passage of an act which is found in the office of the custodian of the laws, purporting to be an act of the legislature and approved by the governor; others only that such journals are competent evidence for the purpose of determining whether or not a constitutional requirement has been observed in the passage of an act of the legislature where such action of the legislature is

required to be entered upon the journal. Other courts, however, have held directly to the contrary, and maintain the conclusiveness of the enrolled act authenticated by the signatures of the presiding officers of the two legislative bodies and the approval of the governor.

When the keeping of the legislative journals is enjoined by the constitution, and that instrument also attaches certain conditions to the enactment of a valid law, and the facts showing a compliance therewith are required to be entered upon the journals, the decided weight of authority in this country favors the resort to such journals to determine whether the law has been enacted in a constitutional manner. The provisions which perhaps more than any other have caused an adherence to that doctrine are those which relate to the number of votes necessary to the passage of a bill, the taking of such votes by ayes and noes, and the entry upon the journal of the names of those members voting thereon.

The states in which it is held competent to resort to the journals to ascertain whether in the enactment of a law the constitutional requirements have been complied with are—Alabama: *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *Sayre v. Pollard*, 77 Ala. 608; *Moog v. Randolph*, 77 Ala. 177 597. Arkansas: *Worthen v. Badgett*, 32 Ark. 496; *Smithee v. Garth*, 33 Ark. 17. Colorado: *In re Roberts*, 5 Colo. 530. Florida: *State v. Brown*, 20 Fla. 407. Illinois: *People v. Starne*, 35 Ill. 121, 85 Am. Dec. 348; *Larrison v. Peoria etc. R. R. Co.*, 77 Ill. 11. Missouri: *State v. Mead*, 71 Mo. 266. Nebraska: *State v. Liedtke*, 9 Neb. 462; *State v. McLelland*, 18 Neb. 236, 53 Am. Rep. 814. New Hampshire: *Opinion of the Justices*, 52 N. H. 622. Ohio: *Miller v. State*, 3 Ohio St. 475. Oregon: *Currie v. Southern Pac. Co.*, 21 Or. 566. Kansas: *Division of Howard Co.*, 15 Kan. 194. South Carolina: *State v. Hagood*, 13 S. C. 46. Tennessee: *Brewer v. Mayor etc.*, 86 Tenn. 732. Utah: *Ritchie v. Richards*, 14 Utah, 345. Virginia: *Wise v. Bigger*, 79 Va. 269. West Virginia: *Osborn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640. Wisconsin: *Meracle v. Down*, 64 Wis. 323. Michigan: *Rode v. Phelps*, 80 Mich. 598. Maryland: *Legg v. Mayor etc.*, 42 Md. 203. Minnesota: *Lincoln v. Haugan*, 45 Minn. 451. California: *Weill v. Kenfield*, 54 Cal. 111; *Oakland Pav. Co. v. Hilton*, 69 Cal. 479; *Stevenson v. Colgan*, 91 Cal. 653, 25 Am. St. Rep. 230. The same rule was adopted by the supreme court of Wyoming when a territory: *Brown v. Nash*, 1 Wyo. 85; *Union Pac. R. R. Co. v. Carr*, 1 Wyo. 96. In

Idaho, in the case of *Blaine County v. Heard* (Idaho, Aug. 4, 1896), 45 Pac. Rep. 890, there is an intimation to the same effect.

The contrary doctrine is held in the following states: Indiana, Louisiana, Maine, Mississippi, Nevada, New Jersey, North Carolina, Texas, and Washington. The state of Connecticut is usually included in this class upon the authority of the case of *Eld v. Gorham*, 20 Conn. 8. In that case, however, we do not understand that the precise question was involved. The question there under consideration was whether the volume termed "The Revised Statutes of the state of Connecticut" was to be decreed to contain all the public statute laws of the state, or whether the court could go behind it and examine the proceedings of the revision committee to ascertain if they had exceeded their powers.

¹⁷⁸ The leading case in Nevada—*State v. Swift*, 10 Nev. 176, 21 Am. Rep. 721—was decided in 1875. The opinion is expressed in that case that the weight of authority favors the conclusiveness of the enrolled act, and the states of Maryland, Missouri, and California are referred to as upholding that doctrine. Since then, however, in each of those states a different rule has been announced, and a resort to the journals is permitted to impeach an enrolled act. The courts of California and Missouri changed front upon the question on account of changes in their respective constitutions; but, as amended, neither of them differed essentially from the provisions of the Nevada constitution under which *State v. Swift*, 10 Nev. 176, 21 Am. Rep. 721, was decided.

The case of *Field v. Clark*, 143 U. S. 649, as to acts of Congress, denied the right to consider the journals as evidence to impeach the correctness of the enrolled act, the contention being made that a section had been omitted therefrom. Article 1, section 5, of the federal constitution contained the provision, which, it was claimed, constituted the journals the best evidence upon an issue whether, in fact, a bill was passed by Congress. That provision requires only that "each house shall keep a journal of its proceedings, and from time to time publish the same, except such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present be entered upon the journal." And the court said: "In regard to certain matters, the constitution expressly requires that they shall be entered upon the journal. To what extent the validity of legislative action may be affected by the

failure to have those matters entered upon the journal, we need not inquire. No such question is presented for determination."

Although Iowa is sometimes mentioned among the states upholding the incompetency of the journals, the courts of that state cannot be said to have expressly so decided. Indeed, in one case, where the question was whether an amendment to the constitution had been previously ¹⁷⁹ agreed to by the general assembly the court examined the journals, and in regard to the question at issue in this case, the court said that whether a bill which had been duly enrolled can be impeached when the journals affirmatively show that it never was passed was a question not before them, and indicated that it would be a proposition not readily solved: *Koehler v. Hill*, 60 Iowa, 543, 554.

We cannot but regard the clear weight of authority in this country as sustaining the propriety of consulting the journals in reference to a matter which the constitution expressly requires to be recorded therein, concerning the constitutional procedure for the passage of an act; and in case upon such an examination it affirmatively appears in respect to the requirements aforesaid that the bill did not, in fact, pass the legislature, or did not receive the constitutional majority, and therefore did not constitutionally become a law, they may be used to impeach the enrolled act, although the latter is signed by the presiding officers of both houses, and carries the approval of the governor. That such is the weight of authority is recognized by the text-writers. In *Cooley's Constitutional Limitations*, it is said: "If it should appear from these journals that any act did not receive the requisite majority, or that in respect to it the legislature did not follow any requirement of the constitution, or that in any other respect the act was not constitutionally adopted, the courts may act upon this evidence and adjudge the statute void." And again: "It will not be presumed in any case, from a mere silence of the journals, that either house has exceeded its authority, or disregarded a constitutional requirement in the passage of legislative acts, unless where the constitution has expressly required the journals to show the action taken; as, for instance, where it requires the yeas and nays to be entered": *Cooley's Constitutional Limitations*, 3d ed., pp. 135, 136; see, also, page 141; *Sutherland on Statutory Construction*, secs. 41-44.

The provisions of our constitution affecting the question before us are as follows:

¹⁸⁰ "Each house shall keep a journal of its proceedings, and may in its discretion from time to time publish the same, except such parts as require secrecy; and ayes and noes on any question shall at the request of two members be entered upon the journal." (Art. 3, sec. 13.)

"No bill shall become a law except by a vote of a majority of all the members elected to each house, nor unless on its final passage the vote taken by the ayes and noes and the names of those voting be entered upon the journal." (Art. 3, sec. 25.)

"The presiding officer of each house shall, in the presence of the house over which he presides, sign all bills and joint resolutions passed by the legislature immediately after their titles have been read, and the fact of signing shall be at once entered upon the journal." (Art. 3, sec. 28.)

It will be observed that the constitution provides in a very positive and mandatory manner that no bill shall become a law except by a vote of a majority of all the members elected to each house, and that no bill shall become a law unless on its final passage the vote be taken by ayes and noes, and the names of those voting be entered upon the journal. The journal record, therefore, will disclose whether or not any measure upon its final passage has received the constitutional number of votes. The presumption unquestionably is, that an act found properly signed by the presiding officers, approved by the governor and deposited in the secretary's office with the other acts of the session, was regularly passed; which is only to be overcome by evidence of which the courts take judicial notice showing the contrary. It is well settled that whenever the existence of an act of the legislature is called in question, the court may resort to any source of information capable of conveying to the judicial mind a clear and satisfactory answer to such question. Not only by the weight of authority, but upon principle as well, we are convinced the constitutional provisions aforesaid constitute the journals concerning the action of the legislature ¹⁸¹ upon the final passage of an act a record, which, by an affirmative showing to the contrary, is competent to overthrow the presumption arising from the certificates of the presiding officers, and the lodgment of the enrolled act with the secretary.

The constitution makes no distinction between the force to be given to the authentication by the presiding officers and the journal account of the legislative procedure in the respect mentioned. Both requirements proceed from the same source;

and it is difficult to perceive any sound reason why the final authentication by the officers should be conclusive of the action of the legislature, when such action is also required to be made a matter of journal entry. The provision that the names of those voting shall be entered upon the journal in connection with the requirement that the vote shall be taken by ayes and noes, and in the same section with the limitation upon legislative power to pass any law, must be considered as intending to subserve a more important purpose than that of simply indicating how any particular member voted. The design was clearly to perpetuate a record or evidence of the fact that the act was passed in strict accordance with the fundamental law. No court disputes the proposition that the legislature is powerless to enact a law in violation of the constitutional requirements, and that no bill becomes a law if, in fact, it was not passed by the legislature: *Field v. Clark*, 143 U. S. 649. The divergence of views arises concerning the character of the evidence which may be accepted in the determination of that question. The English decisions, and those of some of the states, denying any right to consult the journals are not in point, owing to a radical difference between the record authority of the journals of parliament and of the legislatures of such states and legislative journals, under a constitution like our own. Here, the journals are not kept merely in the interest of orderly procedure, but they exist in obedience to a constitutional command, and the nature of their contents is to some extent prescribed. As it is the peculiar ¹⁸⁹ province of the courts to pronounce upon the validity of legislative enactments, they should possess authority to have recourse to the constitutional record of legislative procedure, in so far, at least, as that record is constitutionally required to make disclosure, and within that limit to the extent of giving effect to an affirmative showing.

As to the act in question, the journal shows that it passed the house regularly and with the constitutional number of votes, in the first instance. There were four sections to the bill, the last two, however, respectively merely repealing inconsistent acts and providing the time for its taking effect. The merits of the act were contained in the first two sections, and the second largely depended upon the first as to its effect and application. When the bill reached the senate that body proceeded to strike out all of section 1 as it had passed the house and inserted new provisions in its place, and then passed the

bill in regular form. Upon its transmission to the house the senate amendment was not concurred in. These facts affirmatively appear; and thus up to that point it is clear that the same bill had not passed both houses. The house had agreed to one measure and the senate to another. Thereupon, a conference committee having been duly appointed, a report was submitted by it proposing other provisions for section 1. Both journals contain a copy of that report with the amendment proposed; and in both houses said amendment was adopted, the vote thereon being taken by ayes and noes, and the names of those voting thereon being entered upon the journals of the senate and the house, respectively. It thus by affirmative showing appears that the senate receded from its former amendment, and passed the bill with the amendment reported by the committee. The house adopted that amendment, and thus both houses ultimately agreed upon, and, by the constitutional number of votes as disclosed by the journals, passed the same measure. The final action of both houses is recorded in the journals. We need not decide whether the final action on the ¹⁸³ amendment is, within the sense of the constitution, the final passage so as to require the vote thereon to be taken by ayes and noes and the names of those voting to be entered upon the journal. In this case, at least, that was done, and indicates that such was the legislative understanding. It is sufficient that, with regard to the act under consideration there appears an affirmative showing that the senate amendment, which was enrolled as section 1, did not ultimately pass either house, and did not at any time receive the sanction of the house of representatives. The act which secured executive approval was not the act which passed the legislature, and the latter was not approved by the governor, nor was it presented to him for such approval.

The contents of a pending bill or an amendment thereto need not be recorded at length in the journal; and it is entirely probable that had the amendment reported by the committee, upon which the final action was taken, been omitted, the presumption would be indulged in that the enrolled act correctly represented it; but in this instance it was copied in the record in full, and thus explains the vote in each house. It is inseparably connected with the final action of both bodies, and the court is not at liberty to presume that, as its entry was not required, the vote adopted the section as it is found in the enrolled act. The journals positively and with distinctness in-

form us that the two houses respectively by the vote of their members adopted as section 1 of the act the provisions reported therefor by the committee, which report appears in the journal immediately preceding the record of the motions to adopt and the vote thereon.

Our conclusions on this branch of the case are, therefore, that we have the authority, and it is our duty, to examine the journals to determine whether or not the act in question was passed by a majority of the members elected to each house, that being a matter which the constitution requires to be shown by the journal. That it is affirmatively disclosed by the journals that section 1 ¹⁸⁴ of the act as enrolled and published did not finally pass either branch of the legislature. That by the affirmative showing of said journals it was not passed by a majority of the members elected to each house, and is therefore not a law, and must be adjudged void. Section 1, as passed by the legislature, was not copied into the enrollment, and did not receive executive approval. Therefore that did not become a law. In this case there is no question as to the silence of the journals involved. It is a common holding that, as to matters not positively required by constitutional mandate to be entered upon the journals, their silence would not vitiate the law. It is, however, also held that even as to those matters an affirmative showing that some essential constitutional provision had not been complied with would be sufficient to authorize the courts to declare the law void.

The question next arises, What effect does the invalidity of section 1 have upon section 2, and the subsequent sections of the act? The act is composed of four sections. Section 2 regulates the fees to be collected upon sales of real estate for the nonpayment of taxes by the county treasurer, and provides that such fees shall be paid into the county treasury. It also prescribes what shall be stated in the advertisement preceding such sales. Section 3 repeals all acts and parts of acts inconsistent with that act, and section 4 provides that the act shall take effect and be in force from and after its passage. In the view we take of this case it is unnecessary to decide the question whether upon the failure of any portion of an enrolled act by reason of a noncompliance with some constitutional requirement in the passage of the bill, the entire act would, in every such case, be void.

We are entirely clear, however, that if the portion of the act which actually passed the legislature and is not included in

the enrolled and published statute has any material relation to other portions of the act so as to modify, restrict, or extend its application, then such other portions must also fall. With reference to the act ¹⁸⁵ in question, we are of the opinion that, standing alone, section 2 would have to be construed as regulating only sales of real estate for taxes, such as the county treasurer under other laws would have authority to make; and, in the absence of such provision as appears in section 1, which we hold to be void, that officer sells only for delinquent state, county, and school district taxes; and also that the reference to the advertisement in section 2 would be held to apply to only such sales by the county treasurer, and not to sales by municipal corporations or officers thereof, for the nonpayment of taxes. In section 1, however, as reported by the conference committee and adopted by both houses, there was a proviso that all sales of real estate for the unpaid taxes due thereon to any city, town, or village, by the treasurer of any such city, town, or village, should be governed by the provisions of that act; so that if section 1 as actually passed by the legislature had been copied in the enrolled act and approved by the governor, the advertisement, at least, provided for in section 2 and possibly the fees would have applied to sales made by such municipal treasurers. Indeed, under the provisions of section 1, as it appears in the enrolled act and printed laws, the method of advertising and possibly the fees prescribed by section 2 would apply to sales of lands for delinquent city taxes. It will thus be observed that by eliminating section 1, as it actually passed the legislature, and also eliminating section 1 as found in the enrolled act and printed laws, the application of section 2 is made much narrower than would have been the case had the act as actually passed been correctly enrolled and approved by the governor. We are of the opinion, therefore, that section 2 is so inseparably connected with the preceding section that without such preceding section it cannot be allowed to stand. Section 3, which merely repeals all inconsistent and conflicting acts, has no effect whatever without the two previous sections, and the same observation applies to section 4, so that practically there is ¹⁸⁶ nothing in the act to take effect. Our conclusion, therefore, is that the entire act must be held to be void.

Answering the questions reserved for our opinion by the district court, we say to the first question: Yes, to the extent to which the journals are required by the constitution to show the procedure of the legislature respecting its action upon a bill.

To the second question: Section 1 of chapter 56 of the laws of the year 1897, as the same appears in the bound volume of the laws for said year, is not valid.

To the third question: No part of said section 1 is valid.

To the fourth question: Section 2 of said act is not valid, and section 3 is of no effect.

In respect to questions 5, 6, and 7 we say, that in view of the decision respecting chapter 56 of the Laws of 1897, the matters involved in each question are not pertinent to the issues in this case, and it is unnecessary to answer them. The duty with reference to the sales of real estate for unpaid taxes must be determined by the laws as they exist, irrespective of the act designated as chapter 56 of the Laws of 1897. Owing to the exigencies of the case, our conclusions were orally announced on the first day of October, with the understanding that the opinion would be written, and the order thereon entered at a subsequent time.

Corn, J., concurs.

The late Mr. Chief Justice Conaway concurred in the conclusions as orally announced by the court.

STATUTES — PROOF OF ENACTMENT.— In determining whether an enrolled statute, duly authenticated by the signatures of the presiding officers of the two houses of the legislature, approved by the executive, and properly deposited in the proper office, was passed in conformity with the constitutional requirements, courts may go behind this record, and resort to the journals of the legislature to ascertain the steps taken by each body in the passage of the bill, and if it affirmatively appears from such journals that such statute, though regular on its face, was not actually passed and enacted as required by the constitution, or was not passed in the form in which it appears as enrolled, it must be declared invalid: Monographic note to *Carr v. Coke*, 47 Am. St. Rep. 821. See, also, the recent case of *Ex parte Howard-Harrison Iron Co.*, 119 Ala. 484, 72 Am. St. Rep. 928. But every bill signed and approved as required by the constitution is presumed to have been properly passed: *In re Ellis' Estate*, 55 Minn. 401, 43 Am. St. Rep. 514.

STATUTES PARTLY VOID may be enforced as to the valid part, provided it is separate from the void: *Birmingham etc. R. R. Co. v. Parsons*, 100 Ala. 662, 46 Am. St. Rep. 92; *Steed v. Harvey*, 18 Utah, 367, 72 Am. St. Rep. 789.

KELLEY v. RHOADS.

[7 WYOMING, 237.]

TAXATION OF PROPERTY IN TRANSIT.—A statute which in its terms provides for the taxation of property in transit from one state to another, or which, by its terms, seeks to impose more onerous burdens upon property shipped from a foreign jurisdiction to the state imposing the burden than is borne by like property in such state, is void as in conflict with the federal constitution.

TAXATION OF PROPERTY IN TRANSIT.—Property engaged in interstate commerce, by being transported through a state on its journey from one state to another, is not subject to taxation in the state through which it is passing, as it does not acquire a situs therein.

TAXATION.—BEFORE PROPERTY CAN BE TAXED it must have become identified and incorporated with the general mass of property in the state.

TAXATION OF MIGRATORY LIVESTOCK.—If livestock are brought into the state to graze they are there to be maintained, and while there for that purpose they are as fully identified and incorporated with the other property of the state as it is possible for most livestock to become. The length of time that such property remains is immaterial if the purpose mentioned is present, and no question of interstate commerce is involved, in such case, which militates against the exercise by the state of its power of taxation. Neither in that event is a citizen of another state deprived of any of the immunities or privileges of a citizen of the state in which the stock is grazing, nor is the latter state attempting to make or enforce a law which abridges the rights of a citizen of the United States.

TAXATION OF MIGRATORY LIVESTOCK.—If livestock are brought into the state for the purpose of grazing, it is immaterial how long they remain so far as their taxation is concerned. They may acquire a situs for that purpose and yet remain within the state but a comparatively short time.

TAXATION OF MIGRATORY LIVESTOCK—INTERSTATE COMMERCE—CONSTITUTIONAL LAW.—A statute providing for the taxation of all livestock brought into the state for the purpose of being grazed therein does not encroach upon the exclusive right of Congress to regulate interstate commerce; nor is it void as being in conflict with any provision of the federal constitution.

TAXATION OF MIGRATORY LIVESTOCK.—If the purpose of an owner of livestock in bringing them into the state is not alone that of transportation, but comprehends also that of grazing and feeding them upon the natural grasses, which is their natural source of subsistence, not as a mere necessary incident of the travel, but as one of the purposes of such movement, they do not come within the rule which exempts personal property in transit from taxation in the state in which the stock is thus brought and grazed.

TAXATION OF MIGRATORY LIVESTOCK.—If one purpose in bringing livestock into the state is to drive them through on their journey to another state, then to determine whether there also exists an independent purpose of grazing them within the state so as to subject them to taxation therein, all of the facts must be considered, such as the course taken, the character of the territory grazed upon, the time employed, the subsequent method of intended

shipment, the ordinary facilities for transportation by other means, the place selected for the commencement of the journey by rail, if that is in contemplation, possibly the time of year, the eventual purpose of their shipment, the character of the livestock, and the manner in which they are ordinarily kept, maintained, and grown, and in general every competent fact which tends to explain the purpose in view.

TAXATION OF MIGRATORY LIVESTOCK.—If it is found as a fact that livestock have been brought into the state in the first instance for use or to graze, and have on that account acquired a situs within the state for the purpose of taxation, and have subsequently been shipped out of the state, their shipment is not deemed to have commenced until they are started on their final journey out of the state.

TAXATION OF PROPERTY IN ANOTHER STATE.—Personal property otherwise taxable in the state is not exempt from taxation because returned for assessment and taxation for the same year in another state.

TAXATION—UNIFORMITY.—The mode of assessment as concerns the rule as to uniformity of taxation does not mean that, in the case of the assessment of all kinds of taxable property, the same officers shall act, or that the proceedings touching the assessment shall be the same. There is a uniformity in the assessment and in the mode thereof, if the same basis of valuation is taken as to all property of like character.

TAXATION OF A PECULIAR CLASS OF PROPERTY—CONSTITUTIONAL LAW.—As long as the rate and method of valuation are the same as in another class of property, a statute affecting the taxation of a peculiar class of property may be enacted to guard against its escape therefrom. Absolute equality in taxation is an impossibility.

TAXATION—INVOLUNTARY PAYMENT—RECOVERY.—If a tax is paid after a refusal to pay it upon a demand of the officer, and to prevent the seizure and sale of the property taxed and the damages which would thereby accrue, the payment of the tax is involuntary and made under such circumstances as authorizes a recovery thereof if the tax proves to have been illegally levied.

TAXATION—RECOVERY OF TAXES PAID.—An action to recover back taxes paid by the collecting officer into the county treasury must be brought against the county in its corporate name.

JUDGMENTS—STARE DECISIS.—A mere doubt concerning the correctness of a former decision of the supreme court is not sufficient to require its review, but, if it appears to be radically unsound and to subserve no useful purpose, but, on the contrary, establishes a hardship which is not within the manifest contemplation of the law, and if no injurious results are likely to follow a reversal, no principle of stare decisis interferes with a reconsideration of the principle involved and a reversal of the doctrine formerly announced.

MUNICIPAL CORPORATIONS.—Counties are municipal corporations within the meaning of a statute providing for actions against municipal corporations to recover back taxes wrongfully collected.

JUDGMENTS—STARE DECISIS.—A judgment of the supreme court construing a statute renders it the law for the time being as so construed. Parties have a right to act upon such a decision, and no injury ought to be allowed to result by reason of

a dependence thereon as to pending proceedings, if the decision is subsequently changed, any more than in the case of a repeal of a statute.

Kelley brought this action against Rhoads, as county assessor, to recover certain taxes collected upon a herd of sheep belonging to plaintiff, who was a resident and citizen of Kansas. Such sheep in October, 1895, were in the county of Laramie, Wyoming, in charge of an agent who was driving them through that state from Utah to Nebraska. In driving such sheep, they were permitted at times to spread out and graze over land a quarter of a mile in width. At other times they were driven through large pastures, at other times through the public domain, and at other times through pastures inclosed by fences. While being driven through the state from the west to the east they were maintained solely by grazing along the route of travel. Such sheep were duly returned for taxation by plaintiff, and were assessed for the year 1895, in the county of Juab, state of Utah. In October, 1895, the defendant collected from the agent in charge of such sheep the sum of two hundred and fifty dollars, alleged to be taxes due thereon for the current year. Such agent at first refused to pay such taxes on demand, but upon the statement of the defendant that he could or would take enough sheep and sell them to pay such taxes with costs, the agent paid the tax demanded to avoid the seizure and sale of the sheep and accruing damages. Before the payment of the taxes such agent notified the defendant that such sheep were being driven across the state for the purpose of shipment, and that they were not brought into the state to remain permanently. The time consumed in driving such sheep across the state was some five or six weeks and the distance covered some five hundred miles. For the purpose of shipment, it was not necessary that such sheep should have been driven into the state, as the railroad over which they were shipped could be reached from the point from which they were first driven by traveling a less distance than was required to drive them to any point in Wyoming. Certain questions were reserved for decision by the supreme court, which appear from the opinion herein.

Van Orsdel & Burdick, for the plaintiff.

R. W. Breckons, for the defendant.

²⁵⁰ POTTER, C. J. Section 3776 of the Revised Statutes, as amended January 8, 1891 (Laws 1891, c. 36), prescribes what

property shall be taxable, and sheep are designated therein. The county assessors commence the annual assessment as soon as they are furnished with the assessment-roll with which they are required to be provided by the county commissioners on the first Monday in April in each year. Generally, all personal property is required to be listed in the county where it may be on the first day of April of the current year, and, if the owner resides out of the state, it shall be listed and assessed where it may then be. The board of county commissioners of each county is constituted a board of equalization for the correction and completion of the annual assessment-roll; and they are required to hold, as such, two regular meetings in each year, at the office of the county clerk. The first meeting commences on the fourth Monday in June, and may continue not exceeding fifteen days. The second is required to commence on the fourth Monday in July, and may continue not less than three nor more than six consecutive days. At the first meeting, the board is authorized to add to the roll any omitted taxable property, and to hear and determine the complaints of all parties feeling aggrieved by the assessment of their property as returned by the assessor; and may increase, diminish, or otherwise alter and correct any assessment or valuation. It is made the duty of the county clerk to notify each person whose assessment has been raised or increased by the board of the amount thereof. Such persons may appear before the board at either meeting and be heard respecting the same: Rev. Stats., sec. 3801, as amended by Laws 1890-91, c. 36.

²⁶¹ The annual levy is required to be made by the board of county commissioners on or before the first Monday in September in each year; and thereafter the county clerk is required to prepare a tax list, and deliver the same to the collector (who is and has for many years been the county treasurer), by the third Monday of September, upon receipt of which the last-named officer is required to proceed with the collection: Rev. Stats., secs. 3806, 3808.

No notice or demand on any taxpayer is enjoined, but after the date last above mentioned all such taxes, which include state, county, and school district taxes, are due and payable at the office of the collector: Laws 1890-91, p. 163.

After the tax list has been committed to the collector, if he ascertains that any property has been omitted, upon his reporting the fact to the assessor, the latter is authorized to enter it upon the assessment-roll, and assess the value, and the collec-

tor to enter it upon the tax list, and collect the tax as in other cases: Rev. Stats., sec. 3817.

General provision is also made for the taxation of any personal property "brought, driven, or coming" into the state at any time prior to the last day of each year, and which shall remain for a period of not less than thirty days: Rev. Stats., sec. 3845.

It is made the duty of the proper officers to assess such property at any time after the annual assessment, and the taxes thereon become due and collectible at the same time, and in the same manner as the annual taxes; and if assessed after such annual taxes are payable, they become due as soon as assessed and levied. As to such property, however, it is provided that in case it shall have been in the state before such assessment more than thirty days but less than six months, there shall be collected but a half year's tax, the same to be computed at one-half the tax levied against other like property for the current year. From the provisions of this section, merchants and dealers are excepted as to goods and merchandise brought in to ²⁵³ replenish their respective stocks, and to keep them up to the amount at which they were respectively originally assessed; provided, such merchants have been assessed on their stocks for the current year. This law was upheld in *Frontier Land etc. Co. v. Baldwin*, 3 Wyo. 764. The above outline of the laws in force prior to 1895 will assist in a proper understanding and construction of the act of February 16, 1895, in pursuance and by authority of which the taxes involved in this suit were collected. That act, which has since been repealed by the act of March 1, 1897 (*Laws 1897*, p. 113), was as follows:

"Section 1. All livestock brought into this state for the purpose of being grazed shall be taxed for the fiscal year during which it shall have been brought into the state.

"Sec. 2. Assessors are, for the purpose of enforcing this act, hereby vested with the powers, and charged with the duties, vested in and conferred upon other officers for the collection of taxes.

"Sec. 3. It shall be the duty of the assessors in the several counties to levy and immediately collect the taxes provided for in this act, as soon as any livestock is brought into their counties to graze; and to pay, without delay, such amounts to the treasurers of their respective counties.

"Sec. 4. Whenever the owner of any livestock upon which a tax has been levied as provided in this act shall refuse to immediately pay the amount of such tax to the assessor who levied it, such assessor shall proceed forthwith to collect such tax as provided by law for the collection of delinquent taxes on other kinds of personal property": Laws 1895, c. 61.

This statute is assailed by counsel for plaintiff as being in conflict with that provision of the federal constitution which grants to Congress the power to regulate commerce with foreign nations, and among the several states and with the Indian tribes; and also that provision of the ²⁵³ same constitution which reserves to the citizens of each state all the immunities and privileges of the citizens in the several states; and to that portion of the fourteenth amendment providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is further contended that by the act in question a person may be deprived of his property without "due process of law," which is prohibited by section 5 of article 1 of the state constitution, and that it violates the constitutional requirement of uniformity in taxation: Const., art. 1, sec. 28, art. 15, sec. 11. The provisions of the state constitution invoked are as follows: "No person shall be deprived of life, liberty, or property without due process of law." "All taxation shall be equal and uniform." "All property, except as in the constitution otherwise provided, shall be uniformly assessed for taxation, and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property real and personal."

The facts in the case, and the question submitted for our decision, involve a consideration of the above-mentioned propositions. Touching the provisions of the federal constitution, the greater reliance appears to be placed by counsel upon the one affecting interstate commerce. It has been discussed, and is, perhaps, necessary to be considered in its effect upon the law, and also in its relation to the facts of the present case. It is conceded by counsel for defendant that a statute which, in its terms, provides for the taxation of property in transit from one state to another, or which, by its terms, seeks to impose more onerous burdens upon property shipped from a foreign jurisdiction to the state imposing the burden than is borne by like property in such state would be void as in conflict with the federal constitution. It is urged, however, that the act in question is not such a statute. It is argued that

livestock brought into the state for the purpose ²⁵⁴ of being grazed, is not engaged in interstate commerce. It is further conceded that if livestock should be brought into the state from Utah on the way to eastern markets, the purpose of the owner being solely to pass through the state on his way to such markets, it would not have been brought here to be grazed, and would not be taxable.

It is too well settled to admit of controversy that property engaged in interstate commerce, by being transported through a state, on its journey from one state to another, would not be subject to taxation in the state through which it is passing. The only question to be considered, so far as the law is concerned, is whether its necessary result is the taxation of such property. The proposition is maintained, and is undoubtedly correct, that before property can be taxed it must have become identified and incorporated with the general mass of property in the state. Livestock in this state is, in the greater part, maintained by feeding or grazing upon the natural grasses of the soil. In the case of some kinds of livestock, they are largely allowed to roam at will, but over territory more or less confined in extent. With sheep the custom is to keep them in convenient flocks or herds, intrusted to herders, and to direct them from place to place, generally, as to a particular herd, in some certain locality, but covering in most cases a rather large and indeterminate territory. They are thus maintained until in proper condition for disposition, shipment, or other purposes of the owner. The only way in which such property becomes identified and incorporated with the other property of the state is by being turned at large or herded, to be maintained by grazing. Whether the purpose is that they shall remain in the state permanently or not is not a determining factor. Such a purpose does not exist in the case of the greater proportion of all the livestock in the state. The object of a cattle grower is to ship out of the state his cattle, as soon as they arrive at the proper age, size, or condition. To some extent that is also the purpose ²⁵⁵ which the sheep owner has in view. When livestock are brought into this state to graze, they are here to be maintained. While here for that purpose, they are as fully identified and incorporated with the other property of the state as it is possible for most of our livestock to become. The length of time that such property remains cuts no figure, if the purpose aforesaid is present. No question of interstate commerce is involved, in such case, which

militates against the exercise by the state of its power of taxation. Neither in that event is a citizen of another state deprived of any of the immunities or privileges of a citizen of this state, nor is the state attempting to make or enforce a law which abridges the rights of a citizen of the United States. We observe no distinction, in respect to the matter under consideration, between the case of a sheep owner of Utah or some other state driving or bringing his sheep into this state, for the purpose of and permitting them to graze here, and an owner of like property residing in this state who brings in from another state other sheep for the same purpose.

In our judgment the act did not encroach upon the exclusive right of Congress to regulate commerce between the several states. Similar statutes have engaged the attention of the courts in other states, and none, so far as we are aware, have been adjudged void as an interference with interstate commerce. Some of them have been pronounced invalid for lack of uniformity in taxation, and as violating constitutional provisions of the state in which they were enacted, but that is a subject for subsequent consideration in this case. A statute of Washington taxing livestock brought into that state to graze was upheld in all respects, but the question was apparently not presented, nor was it discussed in the opinion of the court, whether any provision of the federal constitution was infringed upon: *Wright v. Stinson*, 16 Wash. 368.

A much more serious question is encountered upon a consideration of the peculiar circumstances connected with the presence of plaintiff's sheep in this state. It is well ²⁵⁶ settled that personal property merely in transit through a state upon its journey from one state to another, acquires no situs within the state through which it passes on such journey, and is therefore not subject to taxation therein. None of the cases cited or coming to our attention disclose facts entirely similar to those existing in the case at bar. The case of *Coe v. Errol*, 62 N. H. 303, partly involved the legality of a tax assessed by a town in New Hampshire upon a lot of logs which had been cut in Maine and driven through certain lakes and rivers into the Androscoggin river, in New Hampshire, on their way to mills in Lewiston, Maine, but, on account of low water, were left in the town aforesaid during the summer. Said river was a public highway for the floating of timber and logs from the lakes and rivers in Maine, down that river to Lewiston, and had been so used by the owners of the logs for more than

twenty years. It was held that as the logs were brought into New Hampshire in the usual course of transportation, and remained there no longer than was necessary under the circumstances, they were merely passing through the state, and were not taxable in that jurisdiction. It thus appears, from the facts in that case, that there existed no other design with respect to the logs than to convey them on the course of their transportation which had started in Maine, along and through regular highways for that purpose. The only cause for their delay and stoppage in the town levying the tax, was insufficient water to permit their floating farther down the river. A similar instance on principle, though not covering such a length of time, would be the case of goods in transit through the state by cars or freight wagons, and by some natural or accidental cause, further progress of the means of transportation be delayed for a time.

In *State v. Engle*, 34 N. J. L. 425, the property assessed was a lot of coal lying on a pier at Elizabethport which had been mined in Pennsylvania, and sent by rail to Elizabethport to be then shipped by water to other markets for the purpose of sale. That town was the terminus ²⁵⁷ of the railroad on tide water. It was the custom to separate the coal at that place according to sizes, and when a cargo of one size was obtained to ship it to points in New England, or up the Hudson river as soon as a vessel could be chartered to carry it. None of the coal was sold for consumption at Elizabethport. The coal assessed was lying on the wharf awaiting shipment. It was held that as the coal was in transit to market in other states, and delayed in New Jersey, not for the purpose of sale, but merely for separation and assortment for the convenience of shipment to its destination, a tax thereon would amount to a tax on commerce; and with regard to goods in course of transit, the court said: "Delay within the state, which is no longer than is necessary for the convenience of transshipment for its transportation to its destination, will not make it property within the state for the purposes of taxation." And further: "Property in transit through the state, or which has been sent within the state, simply for the purpose of sale, is not to be considered as having a situs within such state for purposes of taxation."

The case of *Connecticut River Lumber Co. v. Columbia*, 63 N. H. 286, is somewhat similar in its facts to *Coe v. Errol*, 63 N. H. 303. A Connecticut corporation doing business in that state contracted for spruce logs to be drawn from Vermont

and delivered on the banks of the Connecticut river, and on the river, in season for the spring drive of 1879, to be marked with the company's mark. There was no other provision for delivery. The logs were cut upon land in Vermont, and were on the ice in said river in the town of Columbia, in New Hampshire, when the tax was assessed, having been delivered there from day to day, during the winter of 1878-79. They were there for the purpose of being transported by the river to the company's mills at Hartford, in Connecticut, as soon as the season would permit, there to be manufactured. The court said: "Upon the facts stated, the logs upon which this tax was assessed were in transit, at the time of the assessment, from Vermont, through this state ²⁵⁵ and Massachusetts to Connecticut. They were not brought into the state and were not in the state for sale, profit, manufacture, employment, or for any other purpose except that of transportation, and having been detained here so long only as was reasonably necessary in the use of the Connecticut river as a natural highway, they had no situs in this state for the purpose of taxation. They were here temporarily, and for a purpose wholly excluding the idea of a permanent lodgment in the state, or of becoming incorporated with and forming a part of the personal property of the state." Now, in the cases above adverted to, it appears that the property was within the state for the sole purpose of transportation, which had already commenced, and the delay was not unreasonable, but was in each instance only such as was necessary.

A somewhat different case is presented in *Brown v. Houston*, 114 U. S. 622. Certain coal was mined in Pennsylvania, exported therefrom, and imported into the state of Louisiana, and when the assessment was made by the authorities of the latter state, the coal was afloat in the Mississippi river in the original condition in which it was exported. It had just arrived by flat boats, and was held for sale by the boatload, and thereafter more than half of it had been exported by foreign steamships, and the balance sold into the interior of the state by the flat boat load. Taxes thereon had been paid in Pennsylvania. It was held that being in New Orleans, and held there for sale without reference to the destination or use which the purchasers might wish to make of it, the tax thereon was not a tax on either imports or exports, or upon commerce. After asserting that the taxing of goods coming from other states, as such, by reason of their so coming, would be

a discriminating tax against them as imports, and would be a regulation of interstate commerce, the court in the opinion said: "But, if after their arrival in the state—that being the place of their destination for use or trade—if, after this, they are subjected to a general tax laid alike on all property within the city, we fail to see how such ²⁵⁹ taxing can be deemed a regulation of commerce which would have the objectionable effect referred to."

The dissenting opinion of Mr. Justice Bradley in the case of Pullman's Car Co. v. Pennsylvania, 141 U. S. 30, has been cited by counsel for plaintiff as containing some expressions applicable to the case at bar. The majority opinion upholds the right of the state to impose a tax upon the capital stock of corporations engaged in transportation within the state, and having at all times a large number of cars in the state, by taking as a basis of assessment such proportion of its capital stock as the number of miles of railroad over which it runs its cars in this state, bears to the whole number of miles of the road. In announcing the reasons of himself and two other members of the court for a dissent, the learned justice used the following language, by way, evidently, of illustration: "Certainly, property merely carried through a state cannot be taxed by the state. Such a tax would be a duty which a state cannot impose. If a drove of cattle is driven through Pennsylvania from Illinois to New York for the purpose of being sold in New York, whilst in Pennsylvania it may be subject to the police regulations of the state, but it is not subject to taxation there." The majority opinion clearly points out the distinction between a tax upon the right to carry on a business and a tax upon the property employed therein, and it was there said: "The state, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders."

The case of Brown v. Houston, 114 U. S. 622, was followed in Pittsburgh etc. Coal Co. v. Bates, 156 U. S. 577, in which case it was contended that the coal and barges moored in the Mississippi river awaiting orders for their further movement, had not reached any destination. The coal was brought down the river for the purposes of sale. The principle may be deduced from these authorities that ²⁶⁰ personal property merely in transit through a state is not subject to taxation therein, as it is not to be considered as having acquired a situs in such state.

The decisions have been usually qualified by adding, "unless the property is there for use or sale," or some other equivalent language. Respecting the reference of Mr. Justice Bradley to the driving of cattle through the state of Pennsylvania, it must appear evident that even if he had said "sheep" instead of "cattle," such a driving through the eastern state he mentioned, and Wyoming, would not necessarily consist of the same qualities. Livestock are not maintained in the eastern states by grazing upon the natural grasses, as is the case in this region. If driven through such a state as Pennsylvania, we apprehend the cattle or sheep would be detained at convenient places for feeding, and thus such delays would be only such as would be necessary to properly care for the stock, and the feeding would be merely an incident of the transit; but with the sheep in the case at bar they grazed, and were thus maintained as they traveled, going slowly enough to permit that, and to accomplish such purpose were allowed to spread out over an area a quarter of a mile in width, travel through pastures fenced and unfenced, or across the public domain; and they were maintained while on the journey in the same manner as if they had not been in course of transit at all. The question therefore arises whether the sheep of plaintiff were brought into the state for use, or, in the language of the statute, to graze; for we assume that if driven into the state for the purpose of being grazed, that is such a "use" as would come within the exception noted in the cases which have been referred to. We do not understand that an ultimate design to transport sheep out of the state is at all inconsistent with a purpose of bringing them into the state to graze. The time of the contemplated shipment may be uncertain, or it may be extended for a considerable period into the future. Incidentally, no doubt, that intention should be taken into account, but ²⁶¹ we do not conceive it to be a conclusive circumstance in determining the situs of the property, or the purpose of its presence within the state.

It is altogether clear that in case of herd sheep in this country they must, according to custom, be maintained somewhere by grazing, until the time fixed upon has arrived for starting them upon their journey to some final destination. It may well be that if it is not desired that they shall reach such destination before a certain time, and that in the meantime the necessity of allowing them to graze and obtain the benefits therefrom is recognized, places therefor may be selected by the

owner which will subserve the latter purpose, and at the same time facilitate their final transportation when the occasion therefor shall occur. Such property is migratory; they are almost constantly moving; the character of the natural grasses, and the effect thereon by the grazing of sheep is such that such movement is necessary. They cannot be permitted to remain stationary and feed in the same place a very long period of time. Therefore it follows that, as they must move, their course can be readily directed along the direction in which they are eventually to be taken. In such a case the purpose of grazing is not inconsistent with the idea of a driving or transportation to some distant place. Nevertheless, the mere fact that in such driving they are also permitted to graze upon the way will not determine, at all hazards, the character of the purpose in bringing them into the state. Each case must, it would seem, depend upon its own facts. It will not do to say that in every case, because an owner brings his sheep into the state to drive them through it to some other jurisdiction for purposes of sale or otherwise, that they are therefore merely in transit; for the reason that such a course might be selected which would consume quite a time in getting out of the state, and at the same time the animals would be maintained by grazing the same as if kept in the state from which they came, or if they had originally been within this state; and all the benefits would be ^{so} derived that would accrue in the absence of any such intended transportation. The sheep would thus be used here in the same and only manner in which during the same time they would be used anywhere. We are of the opinion, therefore, that in determining the purpose, and the situs, the course and method of travel is a proper subject, and one of the elements for consideration. We do not dispute the proposition that an owner of livestock, if not otherwise disobedient to the law, and is observant of the police regulations of the state, has the right to transport them to market by driving on foot, as well as by rail. Strictly speaking, they will be in transit by the one method as much as by the other. If, however, the purpose of such owner is not alone that of transportation, but comprehends also that of grazing and feeding them upon the natural grasses, which is their natural source of sustenance, not as a mere necessary incident of the travel, but as one of the purposes of such movement, they would not come within the rule which exempts personal property in transit from taxation. To determine the existence or

nonexistence of such a joint purpose all the facts must be considered—the course taken; the character of the territory grazed upon; the time employed; the subsequent method of intended shipment; the ordinary facilities for transportation by other means; the place selected for the commencement of the journey by rail, if that is in contemplation; possibly the time of the year, and the eventual purpose of their shipment; the character of the livestock, and the manner in which said stock is customarily kept, maintained, and grown, and, in general, every competent fact which will tend to explain the purpose in view.

These considerations seem to us to involve a mixed question of law and fact; and upon reserved questions this court should not decide questions of fact. A direct decision upon the second reserved question is, therefore, not proper for us to render. We have indicated such legal principles as, in our judgment, should control the determination of that matter. In addition to the observations ²⁶³ already made, we might say that whether or not the sheep were intended to remain here “permanently” is of little consequence, as that term is possible to be understood. Such property may properly acquire a situs in the state for the purposes of taxation, and yet remain here a comparatively short time.

If it shall be found as a fact, reasonably deducible from the agreed statement in the case at bar, that the sheep had been in the first instance brought into the state for use or to graze, and had, on that account, acquired a situs within the state, the observations of the court in the case of *Coe v. Errol*, 116 U. S. 517, would be pertinent. The court had under consideration the right of a town in New Hampshire to tax certain logs which had been brought down the winter before from some point in that state, and placed in the stream, and on the banks thereof in said town, to be from thence floated down the Androscoggin river to the state of Maine, to be there manufactured and sold. It was clear that the logs could not be taxed by reason of their intended exportation, as that would amount to laying a duty on exports which would be an infraction of the federal constitution. Mr. Justice Bradley, speaking for the court, in the opinion said: “Such goods do not cease to be part of the general mass of property in the state, subject as such to its jurisdiction, and a taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another state, or have been started upon such

transportation in a continuous route or journey. . . . It seems to us untenable to hold that a crop or herd is exempt from taxation merely because it is, by its owner, intended for exportation." And in discussing the subject when the journey must be considered as begun, the learned justice said: "But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them to the depot where the journey is to commence, is no part of that journey. ²⁶⁴ That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier, for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm or the forest to the depot is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is not part of the exportation itself. Until shipped or started on its final journey out of the state, its exportation is a matter altogether in fieri, and not at all a fixed and certain thing." Hence, in the case before us, if it should be a fact that the property had already been incorporated with the general mass of personal property in the state, its shipment would not be deemed to have commenced until started on its final journey out of the state, which occurred at the time it was sent by rail from Pine Bluffs station. That station is located on the line of the Union Pacific railway which traverses from east to west the entire state. Sheep driven from the western part of the state from any point in the vicinity of Utah, in an easterly direction, would pass numerous stations on that railway, any one of many of which might be selected as a place of shipment.

The third certified question relates to the fact that plaintiff returned his sheep for assessment and taxation for the same year in Utah. If plaintiff's property was otherwise legally taxable under the revenue laws of this state, the fact above mentioned would not exempt it in the absence of a statute to that effect. We regard that proposition as too well sanctioned by the authorities to require discussion: *Brown v. Houston*, 33 La. Ann. 843, 39 Am. Rep. 284; *Brown v. Houston*, 114 U. S.

622; Pullman's Car Co. v. Pennsylvania, 141 U. S. 30, dissenting opinion; Cooley ²⁰⁵ on Taxation, 137, 219-221; Nelson Lumber Co. v. Loraine, 22 Fed. Rep. 54; Coe v. Errol, 116 U. S. 517; Dyer v. Osborne, 11 B. I. 321, 23 Am. Rep. 460.

Our own constitutional provisions, quoted in an earlier part of this opinion, are invoked in opposition to the law of 1895, and the tax collected from the plaintiff. The proposition contended for is that, under the statute in question, the assessor was required to proceed at once; and that such peremptory action would be a violation of the constitutional rules relating to uniformity, equality, and due process of law. To sustain the proposition contended for, it is argued that uniformity and equality of taxation means equality and uniformity in the rate, and also in the mode of assessment; that as there is implied equality in the burden, that cannot exist without uniformity in the mode of assessment. It is then urged as the sole ground for the claim that there is an absence of uniformity in the mode of assessment, that no provision is made for notice, or for a hearing, or a correction of the assessment or tax as in case of property embraced in the regular annual assessment.

An examination of the authorities cited discloses that reference to the mode of assessment as concerns the rule of uniformity does not mean that, in the case of the assessment of all kinds of taxable property, the same officers shall act, or that the proceedings touching the assessment shall be the same. There is uniformity in the assessment and in the mode thereof, if the same basis of valuation is taken as to all property of like character. The constitution itself provides for the assessment of railroads and other-common carriers upon their franchises, roadway, rails, rolling stock, and all other property used in their operation, except machine shops, rolling mills, and hotels, by a state board for all state, county, and school district taxes; and also that such board shall fix the valuation each year for the assessment of all livestock: Const., art. 15, sec. 10. Property other than that owned ²⁶⁰ by common carriers is assessed by county officials, and the value of all personal property, except livestock, is determined by them.

But is it true that the statutes provide for no hearing or review? It is evident that the law of 1895 must be construed together with other laws relating to the same subject. It seems to have been assumed that the property of plaintiff was assessed and taxed only in pursuance of that statute; but we are unable to assent to that theory. Sections 3845-3849 of the

Revised Statutes, brought into the revision from the laws of 1884, provide for and regulate the assessment and collection of taxes on all personal property brought, driven, or coming into the state prior to the last day of the year. Those provisions were before the court in the case of *Frontier Cattle Co. v. Baldwin*, 3 Wyo. 764, and were held not to contravene any of the congressional enactments which constituted the fundamental law of the territory, and their validity under the state constitution has not been questioned, so far as we are aware. Except as far as they may have been in conflict with the act of 1895, they were in full force during that year. It is required by section 3846 that personal property coming into the state after the annual assessment shall be assessed at the same value as property of like kind and character is appraised and valued for the current year; and that the levy shall be the same as that made upon like property for the current year. The assessor is required to assess such property as soon as possible after he shall obtain knowledge of the existence of such property in the county, and the assessment is to be made in the same manner as other assessments. The county clerk is required to levy the tax thereon, and enter the same upon the tax list for the current year. The duty of collecting the tax devolves upon the regular county collector of taxes: *Rev. Stats., sec. 3847.*

The statute of 1895 changed these provisions somewhat in respect to the levy and collection as to livestock brought into the state to graze. The assessor was substituted ²⁶⁷ for the county clerk and collector, in regard to the levy and collection; but it seems entirely clear that the restrictions upon the manner of the assessment and rate of the levy mentioned in section 3846 would have controlled the action of the assessor in taxing livestock coming in to graze after the annual assessment. Such provisions are general, covering the case of any kind of personal property which is brought into the state subsequent to such annual assessment. The act of 1895 was silent concerning the basis of valuation and rate of levy, and therefore did not repeal the former statutory regulations controlling that matter. The assessable value of all livestock is fixed by the state board in March of each year. It is true that section 3845 provides that the taxes so assessed become due and payable at the same time as other taxes, unless assessed after the regular annual taxes are payable, in which event they become due and payable upon demand. It is, however, also provided by section 3847 that if there is danger of removal, the collector

may levy upon and detain sufficient of the property and hold the same until the taxes thereon are due, unless a sufficient deposit is made with him to cover the taxes and cost.

Although the statute of 1895 required immediate collection, we do not think, in view of the migratory character of the property, and other provisions of the law which will be adverted to, that any principle of uniformity was thereby infringed upon. The courts have gone to great lengths in upholding the authority of the legislature to classify property for purposes of taxation, and establish such rules, according to the nature and habits of the property, as will insure its bearing its due and proper burden of government.

In Wisconsin, the statute was held valid which required the assessors to assess all logs and lumber of nonresidents piled upon the banks of streams for shipment in April, although other personal property was not assessed until the 1st of May. This provision was evidently enacted to guard against the removal of such property ²⁰³ prior to May, and thereby escape taxation: *C. N. Nelson etc. Co. v. Loraine*, 22 Fed. Rep. 54.

The further fact is also pertinent that the interval between the completion of the annual assessment and levy and the time when taxes are regularly payable is so short that a requirement of earlier payment of a tax upon migratory animals could hardly be considered unjust or inequitable.

Now, in regard to hearing and opportunity for review, it is further provided in section 3846 that any person aggrieved by any proceedings under it and the preceding and subsequent sections may apply to the board of county commissioners at any general or special meeting, to have the assessment equalized or corrected in any just particular; and the duty is enjoined upon the board to equalize and correct the same as justice may require, and, if the party complaining has paid an unjust tax, to refund to him the amount he has paid in excess of what he ought to have paid. We perceive no reason why that regulation was not open to any person in the situation of plaintiff, or anyone whose property had been taxed by the assessor under the provisions of the act of 1895, after the annual assessment. Such person would not have been taxed solely in pursuance of the last above mentioned act, but under all the provisions and regulations affecting the taxation of such property as they existed, taken together, modifying and controlling each other. If such livestock as was covered by the act of 1895 had been assessed prior to the determination of the rate of levy for the

current year by the proper officials, the requirement for immediate collection would have been inoperative in its strict sense, as delay on the part of the assessor, for purposes of collection, would have been necessary until the rate had been fixed. In such case the command for immediate collection would have been understood to mean as soon as practicable, or immediately after the rate had been determined upon. In that case, moreover, the person taxed would have had the same opportunities that all ²⁶⁹ other taxpayers were given to appear before the board of equalization.

As long as the rate and method of valuation are the same as in case of other property, we are unable to conceive of any valid reason why a statute affecting the taxation of a peculiar class of property may not be enacted to guard against its escape therefrom. Absolute equality in taxation is an impossibility. The late Mr. Justice Miller of the federal supreme court said, in one of the opinions of that court, that it was an "unrealized dream." In the case of *Commonwealth v. Electric Light Co.*, 145 Pa. St. 147, the court said: "Where the measure of value and the rate are uniform and applicable to all members of a given class, the incidental hardship and inequalities must be borne." And the supreme court of Texas expressed itself as follows: "Taxes are said, within the meaning of the constitution, to be equal and uniform; when no person or class of persons in the taxing district, whether a state, county, or other municipal corporation, are taxed at a different rate than are other persons in the same district upon the same thing, and where the objects of taxation are the same by whomsoever owned or whatever they be": *Norris v. Waco*, 57 Tex. 635. The difficulty is so apparent that we shall not attempt to formulate a general definition of equality and uniformity in taxation applicable to all cases, as such words are used in the constitution. Neither is it requisite in this case that we should do so.

In 1895 the legislature of the state of Washington enacted a law very similar to our statute of the same year. It was provided thereby that when any cattle, horses, sheep, or goats are driven into any county of the state for the purpose of grazing at any time after the first Monday in April, in any year, they shall be liable to be assessed for all taxes leviable in that county for that year the same as if they had been in the county at the time of the annual assessment; and it was made the duty of the assessor to assess the same; and the taxes became due

upon ²⁷⁰ such assessment. The sheriff was required to collect such taxes at once in the manner provided for the collection of delinquent taxes: Washington Laws 1895, p. 105. That statute came before the court in *Wright v. Stinson*, 16 Wash. 368, and was assailed as unconstitutional. It was held that no constitutional right was invaded by the act. Such statutes, in some other states, have been declared invalid, on the ground that there existed no provisions for taxing other kinds of personal property coming in after the annual assessment. As in Washington, so in this state, there is no discrimination in that respect.

The fourth question reserved for our decision is, in substance, whether the payment of the tax by plaintiff, under the evidence, was voluntary or otherwise, and whether it was so made as would authorize its recovery if illegal. The facts as agreed to are that the money was paid, after a refusal to pay the same upon a demand, and to prevent the seizure and sale of plaintiff's property, and the damages which would thereby accrue to the plaintiff. If that is true, we do not perceive what difference it makes, whether the threat made by the collector was that he could take enough sheep, or that he would do so. The concession that the payment was made to prevent the seizure implies that seizure was intended or imminent, and that both parties so understood it. Under such a statute as that of 1895, requiring the same officer to assess, levy, and collect the taxes, giving him all the power of collecting officers, and applying to property of the character upon which these taxes were paid, it would not take very strong evidence of force to show a payment of the tax to be involuntary, particularly so when the statute, as in section 3846, enjoins upon the commissioners the duty of refunding such an amount as they should discover to be unjust. In our judgment, the payment was made under such circumstances as would authorize the recovery if the tax should prove to have been illegal.

The seventh certified question is, "For the recovery of taxes paid in the manner set forth in this case, against ²⁷¹ whom should a suit be brought, and in this case is the suit brought against the proper person?"

Plaintiff relies upon the cases of *Powder River Cattle Co. v. Board of Commrs.*, 3 Wyo. 598, 603, and *Board of Commrs. v. Searight Cattle Co.*, 3 Wyo. 777, wherein it was held that actions to recover back taxes collected by the county collector of taxes, on account of state, county, and school district taxes,

can only be maintained against the officer making the collection. It is clear that unless manifest error has crept into a former decision of the court, and works injustice, it should not be departed from. A mere doubt on our part concerning its correctness is not sufficient to require a review thereof. It is equally well settled that if it appears to be radically unsound, and subserves no useful purpose, but, on the contrary, establishes a hardship which is not within the manifest contemplation of the law, and, moreover, if no injurious results will be likely to follow a reversal, no principle of stare decisis interferes with a reconsideration of the principle involved, and a reversal of the doctrine formerly announced.

In consequence of a deep feeling that nothing but hardship and injustice flows from the law as construed in those cases, and especially as the late chief justice dissented therefrom in vigorous opinions, we deemed it wise and expedient to examine the question anew, in the endeavor to discover whether the statutes are reasonably susceptible of the construction given them in the cases aforesaid.

It may be premised that no provision has ever been made by law for a reimbursement to the collecting officer, should a recovery be maintained against him, and that the invalidity which may require the return of a tax to the one paying it may have been the result of the action of other taxing officials, and even of the board itself in ordering the levy. The statute, then, which imposes such onerous responsibilities upon the public servant who obeys the mandates of the tax warrant, should be unmistakable. It would be far better and more consonant with equity, that ²⁷² the taxpayers should suffer in a single instance than that one officer, possibly without fault, should bear the burden in many; or that the loss should be distributed among several, than borne entirely by a single individual, in case the law has permitted such a loss to fall upon anyone. These observations are suggested merely as incidental to an examination of the statutes themselves. They must control. They should receive such construction, however, as shall harmonize them with the general policy of our laws and institutions should their language permit it.

The statute providing the method of legal procedure to recover back taxes which may have been illegally collected, is section 3055 of the Revised Statutes, and that part relating to such subject reads as follows: "Actions to recover back taxes and assessments must be brought against the officer who made

the collection, or, if he is dead, against his personal representative; and when they were not collected on the tax list, the corporation which made the levy must be joined in the action; provided, that when the money derived from said taxes or assessment has been actually paid over to any municipal corporation for whose use and benefit it was levied or collected, then an action shall be brought against said municipal corporation to recover said taxes or assessments."

That part of the section preceding the proviso was taken from Ohio, in which state the action was in all cases to be brought against the collecting officer, unless not collected on the tax duplicate. The only taxes in this state and possibly in Ohio which would not be placed on the tax list would be local taxes for improvements, such as assessments to construct sewers in the city of Cheyenne, and in other instances where taxes are assessed according to benefits. It is evident that no taxes are collected for state or county purposes except on the tax list, but the party to be joined in an action for the recovery of taxes not on the list is described as the "corporation" without the qualifying word "municipal"; yet it is only such a corporation as a city or town which could possibly be embraced ²⁷³ within the provision. When, however, a municipal corporation is mentioned in the proviso it has been thought to refer only to such a corporation in its most limited sense. I mention this at this time to show that it is entirely probable that the legislature did not intend by the use of said respective designations to confine itself to the precise use of language in legal acceptance. The difficulty supposed to arise in the construction of this section of the statute is in the reference to a "municipal corporation" in the proviso; and a majority of the court in the cases above cited concluded that a corporation such as a "county" would not be included therein.

The first portion of the section having been imported from Ohio, it will be well to notice some of the other relative provisions of the statutes of that state then in force. In the first place, all the regular taxes which go upon any tax list of the state, county, school district, and of any city, village, or hamlet within the county, go upon one list prepared by the county auditor, and all such taxes are collected by the county treasurer. The auditor is required to open an account with each township, city, hamlet, and school district, and after each semi-annual settlement which he makes with the treasurer, to credit each with the net amount collected for its use, and, on the ap-

plication of the treasurer of each such subordinate corporation, to give him a warrant on the county treasurer for the amount then due: Ohio Rev. Stats. 1880, sec. 1047.

It seems that the treasurer is charged with the taxes upon the list, and he may remain charged with an uncollected tax: Ohio Rev. Stats. 1880, sec. 1103; but the auditor may deduct an erroneous tax, giving a certificate thereof to the taxpayer for presentation to the treasurer: Ohio Rev. Stats. 1880, sec. 1038. The treasurer may return an account of uncollected taxes with his reasons therefor: Ohio Rev. Stats. 1880, sec. 1101. Finally, it is provided that in case of any recovery from him, on account of the collection of the public revenue, he shall be allowed and paid out of the county treasury counsel fees and other expenses of his defense in the suit, and the amount of any ²⁷⁴ damages and costs adjudged against him, all of which is required to be apportioned ratably by the county auditor, among all the parties entitled to share the revenue so collected, and deducted from the shares or portions of the revenue at any time payable to each, including as one of said parties, the state, as well as the counties, townships, cities, villages, and school districts, and other organizations entitled: Ohio Rev. Stats. 1880, sec. 2862.

It will be thus observed that, in Ohio, the system is made plain and harmonious. The treasurer collects for all taxing authorities, and, in case of damages recovered against him, is given a sure indemnity. At the same time, a convenient method is provided whereby a taxpayer who has been unlawfully assessed may secure a return of his money.

At the time our legislature adopted the provision in respect to actions to recover taxes illegally collected, it was undoubtedly perceived that the revenue laws were somewhat dissimilar to those of Ohio, that a treasurer was not given indemnity when he had dispensed the funds collected by him, and not desiring to interfere, or alter the provisions already in force concerning the collection of the public revenue, devised the more simple method of adding the proviso, to the effect that, after the municipal corporation for whose use and benefit it had been collected had received the tax, it should be made the respondent in an action for a recovery of such tax. We think that a county is included in the designation "municipal corporation" as used in the proviso.

While it is true that in a restricted sense, and possibly, by way of distinction, the term "municipal" as applied to a cor-

poration is generally understood to refer to such subordinate organizations as a city or town, nevertheless it is not improper, nor at all uncommon in legal parlance, to include a county within the designation "municipal corporation." That was conceded in the majority opinion in the Powder River Cattle Company case.

A further obstacle to declaring that the county is ²⁷⁵ embraced within the meaning of the proviso was deemed to arise from the words, "for whose use and benefit it was levied and collected." It was thought that state and school district taxes were not collected for the use and benefit of the county. If that were so, we are unable to perceive why the statute would not authorize an action against the county for the money which was actually received for its use and benefit; and why it should be allowed, as to them, to hide behind the fact that there might be other money which was not held for its benefit.

The words quoted, however, must receive a reasonable construction. In view of other statutory provisions to which reference will be made, we are not inclined to apply to such words any narrow and confined meaning. As to state taxes, the county is made responsible for all which are levied, and it is not permitted to receive credit except for such assessments as are certified to be double or erroneous. A particular tax is not returned itemized to the state, but payments are made on account of the county's actual statutory liability. Such taxes are in a certain sense collected for the use and benefit of the county. It could not escape settlement with the state by an absolute refusal to collect the taxes. To relieve itself from the burden imposed upon it by law, it must collect and pay over the taxes. Whatever may be the regulations existing between the county as an organization, and the school districts within its boundaries, it levies taxes for the support of all the schools, and the special district taxes which have been legally voted by each district. The treasurer collects them, and is the custodian thereof until lawfully paid out to the district treasurers upon the apportionment and order of the county superintendent as to the common school tax, and according to law as to the special district taxes. Before school district treasurers are entitled to receive any of the money, they are required to furnish bonds to be approved by the board of county commissioners in each case, who also fix the amount thereof. The school money is referred to in the statutes as in the ²⁷⁶ county treasury: Laws 1895, c. 44. For its use and benefit, in accordance with

law, the school moneys are collected and received for the county. Not, it is true, to assist in carrying on the ordinary functions of county government, but, as an agency of the state, to levy and collect taxes to support and maintain the school organizations located within its limits. In that sense we conceive that the language was used in the proviso. Such a construction does no violence to the words employed, but recognizes the various capacities in which the county acts, and the duties devolving upon it, as well as the power with which it is clothed. Neither does that construction work harshly upon the county corporation, as we shall attempt to show.

Section 3821 of the Revised Statutes was thought to be in conflict with the statute above considered. We are not of that opinion, but believe that it harmonizes with it, and tends to explain it. The two sections should be so construed that both shall stand, if possible. That section is as follows: "In all cases where any person shall pay any tax, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to clerical errors or other errors, the board of county commissioners shall direct the treasurer to refund the same to the taxpayer, or, in case any real property subject to taxation shall be sold for the payment of such erroneous tax, the error in tax may at any time be corrected as above provided, and shall not affect the validity of the sale, but such property shall be redeemed by the county as hereinafter set forth."

The provision for redemption referred to is found in section 3833, which, in substance, requires the county to repay to a purchaser at tax sale of any land sold by mistake or unlawfully, the amount to which he would have been entitled had the sale been legal; and the treasurer, unless the invalidity is not his fault, is made liable to the county for the amount. These two sections, 3821 and 3833, must be construed together. The former impresses ²⁷⁷ upon the county board the absolute duty to direct the treasurer to refund any tax found to be erroneous; and in case land has been sold for such erroneous tax, the same may be corrected in the same manner, or, "as above provided," which means by directing the treasurer to refund the same. If sold, then the one entitled to payment is the purchaser, and the amount to be refunded is specified and fixed by the provisions of section 3833.

Now, it is reasonably clear that the thing to be refunded is the tax. The statute does not say that the same shall be re-

turned by a payment out of the general fund of the county, or out of any particular fund. The tax is to be refunded. That tax will have gone into various funds. The command, therefore, as I understand it, is to take the proportionate amounts from each fund. This conclusion was reached in Iowa under a similar statute: *Lauman v. Des Moines*, 29 Iowa, 310; *Stone v. County of Woodbury*, 51 Iowa, 522. See, also, *George's Creek Coal etc. Co. v. County Commrs.*, 59 Md. 255. The erroneous character of the tax may be adjudged by the courts in a suit for a recovery of the amount paid, or by some other authorized proceeding, or the board itself may discover that it is invalid. In either event it is to be refunded to the person entitled thereto. The legislature having constituted the county authorities and officers the agency to assess, levy, and collect the tax, and having designated the county treasurer the custodian of the proceeds, at least temporarily in all cases, it was certainly entirely competent for the law-making power to confer upon the board the authority, nay, more, to impose upon it the duty of directing the custodian to return the tax, and in doing so to take it from the respective funds into which it had gone. It might have been expressed by language more in detail, but we think it has done so by the general terms employed. Suppose the requirement had been that the treasurer refund the tax. Could there be any question but that he should take it from the funds of which it formed a part? Where is the distinction, if the legislative command is that the action of the treasurer ²⁷⁸ shall be directed by the board? Part of the tax collected being for state purposes, the statute requires it to be refunded. The treasurer, by direction of the board, is made the agency to return it. It is not to be expected that the identical moneys received shall be refunded in any event or under whatever construction section 3821 might receive. There is, at all times, more or less money in the various funds which are to be dispensed to other organizations. If not, the payment can be made when any such fund shall be replenished.

Whether the amount of interest and costs which may be paid to a purchaser of lands at tax sale, and which is required to be paid to him by the county on discovery of the illegality of the sale, is to come out of the different funds, or is to be paid by the county itself, to be reimbursed by the liability of the treasurer if it exists, is a question which need not now be determined.

It is not clear to us upon what theory it can be truly said that, as to state taxes, the county should not be compelled if illegally exacted to refund them. The county is a debtor to the state for such taxes; but for all erroneous taxes charged against it, the law requires that it shall be credited; and this court has held that such credit shall be extended upon its account whenever it is certified to the proper state officer: *State v. Board of Commrs.*, 4 Wyo. 313. It is therefore manifest that, should the county refund such erroneous tax, it would be entitled to a credit upon its account with the state.

Under the decisions in the Powder River Cattle Company and Searight Cattle Company cases, a person who has paid an unlawful state and county tax is granted a remedy, but one which consists in pursuing an officer individually, who may only have done his duty skillfully and faithfully; and if that official is unable to respond, the taxpayer is still remediless, and the right given to him is an empty one. If the amount is collected from the officer, or his representative, they are caused to bear a loss ²⁷⁹ which belongs in justice to the public. Thus, the remedy would often be without advantage to anyone, and unjust whenever it should possess any merit. Under the construction which we believe to be the only true and correct one, all those disadvantages depart; all the provisions become harmonious, and without any straining of language. It enforces the manifest legislative design. For the reasons aforesaid, it is our opinion that an action to recover back taxes, when they have been paid by the collecting officer into the county treasury, should be brought against the county in its corporate name. In the cases where the action is to be brought against the collecting officer, he must be sued individually. That seems to be the plain meaning of the statute, and it was so held in *Ohio*: 13 Bull, 334; *Ratterman v. State*, 44 Ohio St. 641.

The effect of a decision of the supreme court construing a statute renders it the law for the time being as so construed. Parties have a right to act upon such a decision, and no injury ought to be allowed to result by reason of a dependence thereon, if the decision is subsequently changed, any more than in case of a repeal of a statute: *Hollinshead v. Von Glahn*, 4 Minn. 190. Until the decision now rendered, since the announcement of the court in the cases hereinbefore referred to the law of the state has been as set forth and adjudged in those cases, at least to the extent that no one should be injured by relying thereon. Consequently, any case which has been

brought against the collecting officer, in his individual capacity, should be permitted to proceed without objection on that ground. This case is not against the officer individually.

We have not arrived at the conclusion to depart from the rule heretofore announced except after mature reflection, and a profound sense of an imperative necessity. This disposes of all the questions except the eighth, which, under our former decisions, is not a proper one for reservation.

280 To the first question, we answer that, if the sheep of the plaintiff were brought into this state for the purpose of being grazed, they were subject to taxation in the year 1895. To the second question, we have stated in this opinion the legal principles which should apply to a consideration of the fact whether or not the animals were driven in for grazing purposes; it is not proper for us to determine the fact itself in this kind of proceeding. To the third question our answer is in the negative. To the fourth question, the payment was involuntary. To the fifth question, the plaintiff was afforded by law an opportunity to be heard, as set forth in this opinion. The taxes were not illegal for any reason mentioned in such question. To the sixth question, chapter 61 of the Session Laws of 1895 was constitutional. Our answer to the seventh question has been given above.

Corn, J., concurs.

Knight, J., did not sit.

TAXATION.—PROPERTY IN TRANSIT is not taxable in jurisdictions through which it passes: See monographic note to *Buck v. Miller*, 62 Am. St. Rep. 475, 476.

TAXATION—MIGRATORY LIVESTOCK.—If cattle owned in one state actually range or graze in a certain county of another state during the entire year, they are taxable in that county: See extended note to *Buck v. Miller*, 62 Am. St. Rep. 465.

TAXES—INVOLUNTARY PAYMENT—RECOVERY.—A payment of taxes may be said to be involuntary when, upon refusal to pay, the collector has authority to levy upon and sell the property: Note to *Cox v. Welcher*, 13 Am. St. Rep. 341. A party who, when threatened with a distress, pays an illegal tax under protest and notice of suit, may maintain an action to recover it back: Extended note to *Detroit v. Martin*, 22 Am. Rep. 520. See, also, *Whitney v. Port Huron*, 88 Mich. 268, 26 Am. St. Rep. 291; and the monographic note to *Baltimore v. Lefferman*, 45 Am. Dec. 164, 165.

STARE DECISIS.—The rule of stare decisis should be adhered to unless it appears that the evil resulting from the principle established must be productive of greater mischief than can possibly result from disregarding the previous adjudications upon the subject: Monographic note to *Truxton v. Fait etc. Co.*, 73 Am. St. Rep. 102. See this note, pages 98-106, for a discussion of the limitations upon the doctrine of stare decisis.

OWENS v. FRANK.

[7 WYOMING, 457.]

WITNESSES—PRIVILEGED COMMUNICATIONS.—A witness cannot refuse to answer a material question in relation to a material conversation on the ground that, having been given and received as a Mason, it is a privileged communication.

WITNESSES—PRIVILEGED COMMUNICATIONS—MEMBERS OF SECRET SOCIETIES.—However binding an obligation may be, as between members of the same society, secret or otherwise, not to divulge to others that which may be confidentially communicated to them, such an obligation must be understood to be subject to the laws of the country, and therefore it cannot be said that such obligation is violated when the disclosure is compelled in a court of justice, in the course of the administration of the laws.

EVIDENCE—PRESUMPTION AS TO MATERIALITY OF REJECTED TESTIMONY.—If testimony of a witness has been rejected upon the sole ground of his incompetency, it must be presumed on appeal that such testimony would have been material without any statement to that effect in the record, and without an offer having been made of what it was expected to prove by the witness.

EVIDENCE—PRESUMPTION AS TO MATERIALITY OF REJECTED TESTIMONY.—The testimony of a witness respecting a conversation having been erroneously excluded on the ground that such conversation was privileged, enough appearing to show that it referred to a sale in controversy, it must be presumed on appeal that it would have been material without any statement of what it was claimed would be elicited thereby.

J. R. Wilson, for the plaintiff in error.

R. H. Vosburgh, for the defendant in error.

⁴⁶¹ **POTTER, C. J.** This was an action to recover possession of certain specific personal property, which the sheriff held under attachment sued out at the instance of certain creditors of one Robert S. Douglas, who had formerly been engaged in the mercantile business. Douglas had sold out his entire stock (including the attached property), fixtures, and accounts to the defendant in error, and thereafter the goods were attached as the property of Douglas, the sale being assailed, on the trial, as fraudulent and void, and as having been made to protect the debtor vendor. The cause was tried to the court, and judgment was rendered for the defendant in error, the plaintiff below, the findings being that he was the owner and entitled to the immediate possession of the property.

One assignment of error only is insisted on, viz., that the trial court erred in ruling that a certain witness produced by the plaintiff in error was not obliged to relate a conversation

which had occurred between the witness and the defendant in error in reference to the sale by Douglas to him, the stock sold, and the financial condition of Douglas. After admitting that he had had a conversation of that character at about the time of the sale, the witness answered that he did not feel at liberty to relate it, for the reason that he received the communication in confidence as a Mason. The court asked him if the conversation was confidential, if it had been given and received in confidence, and if relating it would violate his obligation as a Mason, all of which questions were answered in the affirmative, and thereupon it was ruled that the witness would not be obliged to testify respecting it. Upon request of counsel who had offered the witness, the defendant in error, in open court, refused to release witness from his obligation not to divulge what had been said in the ⁴⁰² course of the conversation. The ruling of the court was excepted to.

The error assigned involves the question whether a witness may refuse to answer a material question in relation to a material conversation on the ground that, having been given and received as a Mason, it is a privileged communication. The question at issue on the trial was whether, as against existing creditors of Douglas, his sale to Frank was fraudulent or not. The witness testified that in the conversation the financial condition of Douglas was discussed, and that he thought the matter of the sale was mentioned, although he professed some lack of recollection as to the matters which entered into the conversation. Counsel for defendant in error does not discuss the question as to whether the conversation was privileged or not, nor does he cite any authority in support of the ruling of the court, but it is contended as there was no offer of proof, or statement of what fact the party producing him expected to prove by the witness, the error, if any, will not be regarded by this court, nor the conversation, whatever it may have been, assumed to have been material.

It is perfectly clear that at common law the conversation would not have been privileged: 1 Greenleaf on Evidence, 15th ed., secs. 236-248; Hoffman v. Smith, 1 Caines, 157, 159. In the case cited the court said in the course of the opinion: "Nor was there any weight in the objection to the competency of Mr. Troup's testimony, his information being received in the character of a friend and not in that of counsel." In Greenleaf on Evidence, at section 248, the author says that the protection is not extended "to confidential friends, clerks, bankers, or

stewards, except as to matters which the employer himself would not be obliged to disclose."

Neither does the statute include such a conversation among privileged communications, although the privilege is extended to certain communications which were not entitled to that protection at common law: Rev. Stats. 1887, sec. 2589. The ruling of the court was therefore erroneous.⁴⁶³ However binding an obligation may be, as between members of the same society, secret or otherwise, not to divulge to others that which may be confidentially communicated to them, such an obligation must be understood to be subject to the laws of the country, and doubtless the societies themselves recognize that such a limitation attaches to the obligation; and therefore it cannot be said that the obligation is violated when the disclosure is compelled in a court of justice, in the course of the administration of the laws.

Should the error be disregarded in the absence of a statement showing what was expected to be proven by the witness? A similar question was decided by this court in the case of *McGinness v. State*, 4 Wyo. 115, and the principle there announced seems applicable to the circumstances in this case. It was held in that case that if the testimony of a witness has been rejected upon the sole ground of his incompetency, it will be presumed that the testimony of such witness would have been material without any statement to that effect in the record, and without an offer having been made of what it was expected to prove by him. In that case the witness had been rejected by the trial court, on the ground that as a codefendant in a criminal case he was incompetent. The reason underlying that rule is that the question in such case is whether the witness shall be heard at all, though his testimony be ever so relevant or important. In the case at bar the trial court did not regard as at all important whether the conversation was relevant or material, or whether in itself it would be competent upon any issue presented in the case, but the ruling was that, notwithstanding its materiality or competency, the witness would not be obliged to relate it. It is clear that no offer of proof could have affected the ruling of the court, or the reason which prompted it. It must, therefore, on the authority of *McGinness v. State*, 4 Wyo. 115, be presumed that the excluded testimony would have been material. The record, however, is not entirely silent respecting the character of the conversation, as understood by the party⁴⁶⁴ attempting to establish it. In

addition to the subject of it, which appeared by the testimony of the witness in question, Mr. Frank was asked on cross-examination if he had not stated to such witness: "You know Bob's condition," meaning Robert S. Douglas, "as well as I do, and something will have to be done," or words to that effect; and Mr. Frank, in answer thereto, testified that he had no recollection of anything of the kind.

On the ground, however, that the testimony was excluded solely for the reason that the conversation was privileged, and as enough appears to indicate that it referred to a sale which was in controversy, and the financial condition of the debtor making the sale, we think it must be presumed that it would have been material without any statement of what it was claimed would be elicited thereby. For the error in the ruling excluding the testimony the judgment must be reversed and a new trial ordered.

Corn and Knight, JJ., concur.

APPEAL—EXCLUSION OF EVIDENCE.—An error in excluding a question cannot be reviewed when the bill of exceptions fails to show what the evidence of the witness would have been if admitted, or what was offered to be proved thereby: *Shinners v. Proprietors etc.*, 154 Mass. 168, 26 Am. St. Rep. 226.

WYOMING NATIONAL BANK v. BROWN.

[7 WYOMING, 494.]

INTEREST—RATE RECOVERABLE.—If there is either an express or implied contract to pay interest until the principal sum shall be paid, interest at the agreed rate, or, in the absence of an agreed rate, at the rate prescribed by law at the date of the contract, is the rate recoverable until payment of the principal, or until the contract is merged in a judgment.

INTEREST ON JUDGMENTS.—If the creditor, upon the breach of the contract, elects to merge it in a judgment, interest as agreed upon by the parties ceases, and the judgment bears such interest as is prescribed by law.

INTEREST ON JUDGMENTS.—If the statute provides that a judgment shall bear the same rate of interest as the contract bore, the rate upon the judgment is, nevertheless, the one fixed by statute, and it does not become the judgment rate by agreement of the parties.

INTEREST—EFFECT OF CHANGE IN RATE BY JUDGMENT.—A change in the rate of interest upon the merger of the contract in a judgment does not impair nor encroach on the right of either party to the contract.

INTEREST UPON JUDGMENTS allowed by statute is not interest in the strict sense, but a fixed measure of damages for delay in payment.

INTEREST ON JUDGMENTS—CHANGE IN RATE.—A judgment is not a contract of which the rate of interest fixed by statute at the time it is rendered is a part, and the rate of interest on a judgment may be changed or modified by statute.

INTEREST ON JUDGMENTS.—Judgments do not bear interest under the common law, and the judgment creditor may, if left to his common-law remedy, recover such damages as he can prove have accrued to him by being deprived of the use of his money, or, if regulated by statute, such sum or rate as the statute has fixed as the value of the use of the money during the time he has been unreasonably deprived of the use of it.

INTEREST ON JUDGMENTS—CHANGE OF RATE BY STATUTE.—A statute reducing the rate of interest which judgments shall bear, passed after the rendition of the judgment, is a conclusive determination by the legislature that the damages accruing to the judgment creditor by being deprived of the use of the amount due are measured by a lower rate of interest during the period subsequent to the taking effect of the statute than from the rendition of the judgment up to that time, and no rights of the creditor, who is, for the period after the passage of the statute, required to accept a reduced rate of interest upon his judgment, are destroyed or interfered with by such legislation.

On July 27, 1892, defendants executed their note bearing interest at the rate of twelve per cent per annum until paid. On June 12, 1893, plaintiff obtained judgment on the note. At the time such judgment was rendered the statutory rate of interest on all judgments for money was twelve per cent per annum from the date of rendition thereof until satisfied. On February 11, 1895, the legislature passed a statute providing that the rate of interest on judgments for money from the date of rendition thereof until satisfied should be eight per cent per annum. The defendants paid interest at the rate of twelve per cent per annum up to February 11, 1895, and at the rate of eight per cent thereafter. The question reserved for decision by this court is, "In computing interest upon the judgment entered in this case, June 12, 1893, upon a cause of action founded upon a promissory note, dated July 27, 1892, and bearing interest by the terms of said note at the rate of one per cent per month from date until paid, should the interest be calculated at the rate of twelve per cent, or at the rate of eight per cent per annum after February 11, 1895?"

N. E. Corthell, for the plaintiff.

C. P. Arnold, for the defendants.

490 CORN, J. In reason, and by the very great preponderance of authority, where there is either an express or implied

contract to pay interest until the principal sum shall be paid, interest at the agreed rate, or, in the absence of an agreed rate, at the rate prescribed by law at the date of the contract, will be the rate recoverable until payment of the principal, or until the contract is merged in a judgment: *State v. Guenther*, 87 Wis. 673; *O'Brien v. Young*, 95 N. Y. 429, 47 Am. Rep. 64; *Morley v. Lake Shore Ry. Co.*, 146 U. S. 163.

It is also well settled that when the creditor, upon a breach of the contract, elects to merge it in a judgment, interest as agreed upon by the parties ceases, and the judgment will bear such interest as is prescribed by statute. There is no difference whatever in principle where the statute provides that the judgment shall bear the same rate as the contract bore, for it is equally true in such cases that the rate which the judgment bears is the one fixed by statute, and it does not become the judgment rate by agreement of the parties. And it has never been seriously contended that, by such change in the interest rate upon the contract being merged in a judgment, any right of either party to the contract is impaired or encroached upon. At common law, judgments bore no interest, though compensation by way of damages might be recovered for unreasonable delay in payment. Indeed, the interest upon judgments allowed by statute is not interest ³⁰⁰ in the strict sense, but a fixed measure of damages for such delay. It stands in the place of proof of the damages accruing to a judgment creditor by failure of the judgment debtor to pay when it was his duty to do so, and such damages would be the value of the use of the money, or the rate required to obtain it, during the time of the debtor's failure to pay. This being true, it would follow that the absolutely just rule or measure of damages would be the average rate of interest in the market from the rendition of the judgment to the time of payment.

Upon the propositions so far stated we think there can be no serious controversy. But it is contended that the judgment is a contract, of which the rate of interest fixed by statute at the time it is rendered is a part, and that the terms of such contract cannot be subsequently changed or modified by statute. And if a judgment is a contract in the sense of the term as used in our constitutions and statutes, there is apparently no escape from this conclusion. It has been stated by many judges and text-writers that a judgment is a contract, but we think this is true only, as stated in an Alabama case, in "a very recondite and remote sense of the term": *Keith v. Estill*,

9 Port. 669. In this sense all men as members of society enter into a contract to perform whatever the law prescribes, and a judgment inflicting a punishment and a judgment for money are alike contracts in this sense. But it cannot be properly said that one convicted of felony serves a term of imprisonment in performance of a contract, or that a pardon by the executive is a mere release of his contract to serve such term. A judgment does not come within any definition of a contract as the term is used in our constitutions and statutes. It is lacking in the element of an agreement or convention of the parties—the meeting of the minds of the parties—which is essential to a valid contract; for, usually at least, a judgment is against the will of the defendant. We are of the opinion that, in the recognized legal sense, a judgment is not a contract: *Wyman v. Mitchell*, 1 ³⁰¹ Cow. 316; *McCoun v. New York Cent. etc. R. R. Co.*, 50 N. Y. 176; *Rae v. Hulbert*, 17 Ill. 572; *Smith v. Harrison*, 33 Ala. 706; *Larrabee v. Baldwin*, 35 Cal. 156; *State v. New Orleans*, 109 U. S. 285; *Morley v. Lake Shore Ry. Co.*, 146 U. S. 162; *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64.

But the right of the judgment creditor to the rate of interest in force by statute at the time of the rendition of the judgment is also urged upon a somewhat different ground. It is said: "It is an implied condition of every agreement that the party failing to comply with its terms shall be liable to the party injured in such sum as the law will give him at the time the default is adjudged." But the question at once suggests itself: Why imply the particular condition stated? If it is a matter of implied contract at all, why should it not be implied that the rate should be such as the law provided at the time the agreement was made rather than at the time the default is adjudged? Story says: "Implied contracts are such as reason and justice dictate from the nature of the transaction, and which, therefore, the law presumes that every man undertakes to perform." Would not the law rather presume an agreement for a rate or sum fixed and known to the parties than one largely conjectural and dependent upon the will of a future legislature? In that case the act in force at the making of the contract would control, even if, at the time judgment was awarded, it had been repealed and a new rate established by the legislature. But no court, it is believed, has gone so far as to adopt this view. Indeed, it is difficult to understand how a

law not yet in existence can be incorporated into, and become a part of, a contract. It is true a contract may be affected by a law subsequently enacted within the limitation that its obligation shall not be impaired. But this falls very far short of the proposition that a statute to be enacted in the future becomes incorporated into, and a part of, a contract at the time such contract is made; it clearly cannot be incorporated afterward at the time the statute is ⁵⁰² enacted, for that would be to modify the agreement, and, in effect, make a new contract for the parties.

Is it not the more reasonable view that it is not a matter of contract at all, and, judgments not bearing interest at the common law, he may, if left to his common-law remedy, recover such damages as he can prove have accrued to him by being deprived of the use of his money; or, if regulated by a statute or statutes, such sum or rate as the statute or statutes have fixed as the value of the use of the money during the time he has been unreasonably deprived of it? This, in our opinion, is the correct view.

An act reducing the rate of interest which judgments shall bear, passed after the rendition of the judgment, is a conclusive determination by the legislature that the damages accruing to the judgment creditor by being deprived of the use of the amount due are measured by a lower rate of interest during the period subsequent to the taking effect of the act than from the rendition of the judgment up to that time. If this view is correct, the plaintiff in this case has received all damages which accrued while its judgment remained unpaid, and none of its rights have been destroyed or interfered with by legislation. The defendants' obligation to pay interest being simply that which the law imposed, they discharged that obligation by paying what the law exacted.

The specific answer to the question reserved is that the interest should be calculated at the rate of twelve per cent up to February 11, 1895, and at eight per cent thereafter.

Potter, C. J., and Knight, J., concur.

INTEREST ON JUDGMENTS.—At the common law judgments carry no interest; its allowance on judgments is controlled entirely by statute: *Hoyt v. Beach*, 104 Iowa, 257, 65 Am. St. Rep. 461.

INTEREST ON JUDGMENTS—RATE OF.—If it is stipulated that a mortgage shall bear seven per cent interest until paid, and after its maturity, but before the entry of judgment thereon, the

legal rate of interest is reduced to six per cent, seven per cent interest will be allowed until the decision of the case and six per cent after the entry of the judgment: Note to O'Brien v. Young, 47 Am. Rep. 73. See, too, the note to Briggs v. Winsmith, 30 Am. Rep. 49.

INTEREST ON JUDGMENTS—CHANGE IN LEGAL RATE.— If, after the recovery of a judgment, the statutory rate of interest is changed, the judgment will bear the rate prescribed by the law when it was entered: Note to O'Brien v. Young, 47 Am. Rep. 73. Compare the note to Briggs v. Winsmith, 30 Am. Rep. 49, 50.

INTEREST—RATE AFTER MATURITY OF OBLIGATION.— After a breach of a contract to pay money, interest is given as damages, and is recoverable by the statute and not by virtue of the contract: Note to O'Brien v. Young, 47 Am. Rep. 73-75; and the measure of damages is the rate fixed by law: Note to Mason v. Callender, 72 Am. Dec. 116. See, also, the extended note to Briggs v. Winsmith, 30 Am. Rep. 47-50.

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ADOPTION.

1. **AN ADOPTION STATUTE**, being in derogation of the common law of inheritance, must be strictly construed as against the adopted child. (Watts v. Dull, 141.)

2. **ADOPTION—PROCEDURE.**—A PETITION in adoption proceedings is fatally defective if it fails to state, in accordance with the requirements of a statute, the name and residence of the parents, whether the parents consent to such adoption, or that the parents deserted the child for one year next preceding the application. (Watts v. Dull, 141.)

3. **ADOPTION—HUSBAND NOT JOINING IN PETITION.**—Under a statute providing that a married person cannot adopt a child unless the husband or wife of such person joins in the petition, a married woman cannot adopt a child unless her husband joins in the petition, even though the husband is insane and the wife is his conservator. (Watts v. Dull, 141.)

4. **ADOPTION—RIGHT TO INHERIT.**—A child by adoption cannot inherit from the adoptive parent unless the adoption has been had in strict accordance with the statute. (Watts v. Dull, 141.)

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See Husband and Wife, 13; Marriage and Divorce, 5.

ADVERSE POSSESSION.

1. ADVERSE POSSESSION—MINERAL INTERESTS.—The grantees in a deed which reserved the mineral interests in the land conveyed to them cannot, as against the grantors or their privies, set up title by prescription to such mineral interests, unless they have in some manner given notice to the grantors or their privies that they intended to hold or were holding adversely to them. (*Houser v. Christian*, 72.)

2. ADVERSE POSSESSION—LIFE TENANT AND REMAINDERMEN.—A life tenant in possession or his grantee during the lifetime of the former cannot hold adversely to the remaindermen. (*Bowen v. Brogan*, 387.)

3. EASEMENTS.—PREScriptive RIGHTS MAY BE ACQUIRED IN AN ALLEY, though it was originally laid out as such. (*Moon v. Mills*, 390.)

4. DEEDS—COLOR OF TITLE.—The fact that a deed to premises limits their use to a particular purpose does not prevent it from constituting color of title in ejectment. (*Petit v. Flint etc. R. R. Co.*, 417.)

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AGENCY.

1. AGENCY—POWER TO APPOINT SERVANT OR SUB-AGENT.—An agent's authority embraces all the means usual and necessary for its proper execution; hence a general agent may appoint a servant for the purpose of doing some particular act, not involving the exercise of discretion, provided it is within the scope of the agency, though he may not appoint a subagent to exercise discretionary powers. (*McCroskey v. Hamilton*, 79.)

2. AGENCY—OBLIGATION OF PRINCIPAL AND NOT OF AGENT.—A contract of guaranty signed, "Iowa National Bank, by William Daggett, V. P.," is the obligation of the bank, and not of the signer, Daggett, notwithstanding the use of the pronouns "we" and "our" in the contract. (*Thilmany v. Iowa Paper Bag Co.*, 259.)

3. AGENCY—LIABILITY OF AGENT UPON UNAUTHORIZED CONTRACT OF PRINCIPAL.—There is no implied warranty by an agent that his principal has authority to make a contract signed by the agent, and the agent, acting within the scope of his authority, is not answerable upon such a contract where his principal is not bound by it. Hence, as a national bank is not bound by an unauthorized contract of guaranty, an officer or agent of the bank cannot be held personally answerable upon such a contract made by him within the scope of his authority on behalf of the bank. (*Thilmany v. Iowa Paper Bag Co.*, 259.)

4. ACTION—RIGHT OF, WHERE AGENCY IS KNOWN.—A third person's right of action to recover money lawfully collected by an agent for his principal is against the principal and not against the agent, where the plaintiff knew that the defendant was merely an agent. (*Wilson v. Wold*, 843.)

See Estoppel, 3; Husband and Wife, 1; Insurance, 1, 4, 8, 9; Mechanics' Liens, 9, 10; Municipal Corporations, 4; Negotiable Instruments, 4-6.

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APPEAL.

1. APPEAL—SUFFICIENCY OF BOND—REVENUE STAMP. The federal war revenue law of 1898 exempts from its operation bonds used in legal proceedings. Hence, an appeal bond is good, though it has no revenue stamp attached to the certificate of the qualification of the sureties to the bond, where it is otherwise valid. (*Dawson v. McCarty*, 841.)

2. APPEAL—FINDING OF FACT IN EQUITY CASES.—Much deference is due to the finding of facts by the trial court in equity cases, but such finding is not binding on the appellate court, and cannot be allowed to stand when clearly erroneous. (*Richardson v. Smart*, 488.)

3. APPEAL—FINDINGS—CONCLUSIVENESS OF.—A finding by a court as to existence of an agency, which would be a question for the jury upon a jury trial, is binding upon a court of appeals. (*Hunter v. Clarke*, 160.)

4. APPEAL—WHAT CONSIDERED—COURT EXAMINING WITNESS.—If no objection is made at the trial to the action of the court in examining witnesses, to the exclusion of counsel, no question in regard to such action can be raised on appeal. (*Marshall v. Grosse Clothing Co.*, 181.)

5. APPEAL FROM ORDER DIRECTING A VERDICT.—If a notice states that the appeal is taken from "the findings and judgment" of the trial court, but the record fails to show that a judgment was rendered on the verdict, the appeal will be treated as one from an order directing a verdict. (*Clark v. Van Loon*, 219.)

6. APPEAL—INTERMEDIATE ORDERS.—An order directing a verdict is appealable, under a statute allowing an appeal from an intermediate order which involves the merits, or which materially affects the final decision. (*Clark v. Van Loon*, 219.)

7. AN APPEAL FROM THE VERDICT OF A JURY is not allowable. (*Clark v. Van Loon*, 219.)

8. APPEAL—ERROR IN EXCLUSION OF EVIDENCE.—It is not error to exclude an answer where it does not appear what it was expected to be, where it is presumably hearsay, and where it is not shown that anything admissible was expected. (*Commonwealth v. Chance*, 306.)

9. APPEAL—NONPREJUDICIAL EXCLUSION OF EVIDENCE.—A ruling which denies the admission in evidence of a letter of guaranty is without prejudice where the writing of it is admitted by the guarantor. (*Thilmany v. Iowa Paper Bag Co.*, 259.)

10. APPEAL—NECESSITY OF JUDGMENT.—The right to an appeal presupposes a judgment after a hearing, or an opportunity to be heard, and an appeal allowed from a judgment rendered without such hearing or opportunity must be dismissed. (*Delles v. Second Nat. Bank*, 875.)

11. APPEAL—ENTRY OF JUDGMENT.—The judgment of the board of water control and the entry thereof in its records are separate acts, and the time in which an appeal from such judgment may be taken does not begin to run until the entry thereof in the records of the board. (*Daley v. Anderson*, 870.)

12. **APPEAL—ENTRY OF JUDGMENT.**—Entry is not essential to the validity of a judgment, but it is, as a general rule, a prerequisite to the right of appeal. (*Daley v. Anderson*, 870.)

13. **APPEAL—TIME IN WHICH MAY BE TAKEN.**—A statutory provision limiting the time of appeal is jurisdictional, and such time cannot be enlarged by the court nor by agreement of the parties, and if a notice of appeal is not filed within the time prescribed by law, the appellate court is without jurisdiction to entertain such appeal. (*Daley v. Anderson*, 870.)

14. **APPEAL—COMPUTATION OF TIME FOR.**—Under a statute requiring the petition on appeal to be filed within six months after the appeal is perfected, the statute is complied with if the appeal is perfected on August 30th, and the petition on appeal is filed on the following February 28th. (*Daley v. Anderson*, 870.)

15. **APPEAL—DECISIONS ON QUESTIONS OF FACTS—WHEN NOT REVERSED.**—When a probate appeal is taken upon the evidence alone, the decision of the probate judge on questions of fact will not be reversed unless it clearly appears to be erroneous, and if the decree is warranted by any reasonable view of the evidence it is to stand. (*Brown v. Brown*, 292.)

16. **APPEAL—THE OPINION OF THE TRIAL COURT IN GRANTING A MOTION FOR A NEW TRIAL IS NO PART OF THE RECORD, AND CANNOT BE RESORTED TO FOR THE PURPOSE OF ADDING TO THE RECORD SOUGHT TO BE REVIEWED.** (*Butte Min. Co. v. Societe Anonyme etc.*, 505.)

17. **APPEAL—DIRECTING VERDICT.**—IT IS REVERSIBLE ERROR to direct a verdict upon conflicting evidence which would have warranted a finding contrary to that which was directed. (*Tuck v. National Bank of Athens*, 69.)

18. **APPEAL—INSTRUCTIONS—ERROR.**—The omission from a requested instruction of the words "abiding conviction amounting to a moral certainty," as explanatory of the obligation of the government to prove its case beyond a reasonable doubt, is not error where the substance of the instruction has been given. (*Commonwealth v. Chance*, 306.)

19. **EVIDENCE—PRESUMPTION AS TO MATERIALITY OF REJECTED TESTIMONY.**—If testimony of a witness has been rejected upon the sole ground of his incompetency, it must be presumed on appeal that such testimony would have been material without any statement to that effect in the record, and without an offer having been made of what it was expected to prove by the witness. (*Owens v. Frank*, 932.)

20. **EVIDENCE—PRESUMPTION AS TO MATERIALITY OF REJECTED TESTIMONY.**—The testimony of a witness respecting a conversation having been erroneously excluded on the ground that such conversation was privileged, enough appearing to show that it referred to a sale in controversy, it must be presumed on appeal that it would have been material without any statement of what it was claimed would be elicited thereby. (*Owens v. Frank*, 932.)

21. **JUDGMENTS—STARE DECISIS.**—A mere doubt concerning the correctness of a former decision of the supreme court is not sufficient to require its review, but, if it appears to be radically unsound and to subserve no useful purpose, but, on the contrary, establishes a hardship which is not within the manifest contemplation of the law, and if no injurious results are likely to follow a reversal, no principle of stare decisis interferes with a reconsideration of the principle involved and a reversal of the doctrine formerly announced. (*Kelley v. Rhoads*, 904.)

ARGUMENT OF COUNSEL.

See Trial, 1.

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See Railroad Companies.

ASSIGNMENT.

See Chattel Mortgages, 4, 5; Expectancies: Suretyship, 2; Wills, 12, 13.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. **ASSIGNMENT FOR BENEFIT OF CREDITORS—PROOF AGAINST ESTATE—LIABILITY ON NOTE—RIGHTS OF INDORSER.**—Where the maker of a note has made an assignment for the benefit of creditors, a holder of such note may make proof of the entire debt against the assignor's estate, without deducting a partial payment made by the indorser, and the indorser has no right by reason of the partial payment to prove the amount thereof against the estate of the maker. (*Beales v. Mayher*, 367.)

2. **ASSIGNMENT FOR BENEFIT OF CREDITORS—WHEN NOT FRAUDULENT—EMPLOYMENT OF DEBTOR AS CHIEF SALESMAN.**—If a stock of merchandise is conveyed to a trustee by a deed of assignment for the benefit of creditors, with discretionary power to him to continue the business for a limited time, the fact that he, after electing to continue the business, employs the debtor, as his chief salesman, to dispose of the goods, does not invalidate the deed. (*Hurst v. Leckie*, 798.)

3. **ASSIGNMENT FOR BENEFIT OF CREDITORS—WHEN NOT FRAUDULENT—CONDUCTING BUSINESS.**—If a stock of merchandise is conveyed to a trustee by a deed of assignment for the benefit of creditors, neither a provision, in such deed, giving to the trustee discretionary power to run and operate the business for a year, if he deems it wise, in the interest of creditors, to do so, nor a provision therein empowering him to replenish the stock by cash purchases of such additional stock as will aid in keeping up the business and disposing of the other stock to a better advantage, renders the deed fraudulent per se. (*Hurst v. Leckie*, 798.)

4. **ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—RELEASE CLAUSE.**—If a debtor makes a deed of assignment for the benefit of creditors and stipulates therein for a release from his debts by his creditors, he must convey his whole estate, or substantially all, and where the deed does convey the whole thereof, except that exempt by law, it is valid. (*Hurst v. Leckie*, 798.)

5. **ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—WITHHOLDING PROPERTY.**—If a deed of assignment to a trustee for the benefit of creditors conveys the whole of the debtor's estate, the fact that he withholds property, not exempt by law, does not invalidate the deed, although it contains a release clause, for the trustee, having the title, may recover the property not delivered. (*Hurst v. Leckie*, 798.)

6. **ASSIGNMENT FOR BENEFIT OF CREDITORS—WHEN FRAUDULENT.**—A deed of assignment for the benefit of creditors is fraudulent, if it reserves any benefit to the grantor himself; or introduces such limitations and contingencies as will give him control over the property, or its proceeds, and enable him, in effect,

to defeat the conveyance; or reserves to the grantor any power to revoke the instrument; or stipulates for the maintenance of the grantor or his family; or provides for the grantor's employment, at a fixed salary. (*Hurst v. Leckie*, 798.)

ASSOCIATED PRESS.

See Corporations, 4; Injunctions, 2; Monopolies.

ASSOCIATIONS.

1. **BENEFICIAL ASSOCIATIONS—ACTION ON CERTIFICATE BY FATHER AS BENEFICIARY.**—A father designated as the beneficiary in a certificate of a benefit association is authorized to sue for the benefit, although the member was a minor at the time of his death, and left a wife and child surviving him, where the by-laws of the association included the father among those whom a member might designate as his beneficiaries. (*Byram v. Sovereign Camp etc.*, 265.)

2. **BENEFICIAL ASSOCIATIONS—ACTION ON CERTIFICATE AFTER ILLEGAL EXPULSION—DEFENSE.**—It is no defense to an action brought by a beneficiary named in a certificate of a benefit association that the member failed in his lifetime to pay an installment of dues where the order had proceeded to expel him, but in an unauthorized way, and would not receive his dues, thus causing the default of which it seeks to take advantage. (*Byram v. Sovereign Camp etc.*, 265.)

3. **BENEFICIAL ASSOCIATIONS—ACTION ON CERTIFICATE AFTER ILLEGAL EXPULSION—MAINTENANCE OF.**—An action may be maintained by a beneficiary named in a certificate of a benefit association, where proceedings void for want of jurisdiction were had in the member's lifetime for his expulsion, and he was not therefore expelled, although the order would not recognize the member's right to pay assessments or his connection with the association, and there was no reinstatement by mandamus or otherwise. (*Byram v. Sovereign Camp etc.*, 265.)

4. **BENEFICIAL ASSOCIATIONS—EXPULSION—EXHAUSTING REMEDIES—RESORT TO COURTS.**—When a local camp of Woodmen of the World attempts in an unauthorized manner to expel a member thereof, to whom a benefit certificate has been issued, the member has not failed to exhaust all remedies of the association before resorting to the courts for redress, in not taking an appeal from the sovereign commander to the sovereign camp, where no provision is made for such an appeal. (*Byram v. Sovereign Camp etc.*, 265.)

5. **BENEFICIAL ASSOCIATIONS—EXPULSION—WHEN INEFFECTUAL—RESORT TO COURTS.**—If a local camp of Woodmen of the World attempts in an unauthorized manner to expel a member thereof, to whom a benefit certificate has been issued, he must exhaust all remedies of the association before resorting to the courts, but the exercise of his right of appeal to the sovereign commander and that officer's approval of the action of the local camp do not make the member's expulsion effectual. (*Byram v. Sovereign Camp etc.*, 265.)

6. **BENEFICIAL ASSOCIATIONS—EXPULSION—ACQUIESCENCE—WHAT IS NOT.**—When a benefit association wrongfully attempts to expel a member thereof, without complying with its procedure in cases of expulsion, the presence of the member when a motion is made for his expulsion, and his failure to object to the unauthorized proceeding or to the jurisdiction of the

order to expel him cannot be construed into an acquiescence in the proceeding, for it is void. (*Byram v. Sovereign Camp etc.*, 265.)

7. BENEFICIAL ASSOCIATIONS—EXPULSION—WHEN VOID—JURISDICTIONAL FACTS.—If a member of a benefit association is entitled, under its by-laws, to have charges in writing preferred and notice thereof served on him, as well as notice of the time and place of trial, these are jurisdictional facts which the association cannot disregard. Hence, an expulsion without written charges, without notice of charges, without trial, and without a finding of guilt, but upon a mere motion and a vote of the order, is without authority and void. (*Byram v. Sovereign Camp etc.*, 265.)

8. BENEFICIAL ASSOCIATIONS—EXPULSION OF MEMBERS—WHEN UNAUTHORIZED AND VOID.—A benefit association having by-laws which prescribe a method for expelling its members must be governed by them. Hence, the expulsion of a member by a mere vote of the order, upon a motion made for that purpose, is void when the by-laws require charges in writing to be preferred and notice thereof to be served on him, as well as notice of the time and place of trial. (*Byram v. Sovereign Camp etc.*, 265.)

See Insurance, 15; Judgments, 4.

ATTACHMENT.

1. ATTACHMENT.—A MUNICIPAL CORPORATION MAY BE GARNISHED or attached for an ordinary debt which it owes to a third person, though he is a nonresident. (*Portsmouth Gas Co. v. Sanford*, 778.)

2. ATTACHMENT.—REAL PROPERTY FRAUDULENTLY CONVEYED by a debtor is subject to attachment. (*Bank of Colfax v. Richardson*, 664.)

3. ATTACHMENT OF NONRESIDENT'S PROPERTY—JURISDICTION—COLLATERAL ATTACK.—A judicial requirement, in an action on a money demand against a nonresident, that any property to be affected by the adjudication must be brought under the control of the court, in the first instance, by attachment, is satisfied, and the court acquires sufficient jurisdiction of the res to protect its proceeding from collateral attack, when the property of the defendant has been actually brought within the power and control of the court by a seizure under a lawful attachment, although there may be irregularities or even error in the attachment proceedings. (*Bank of Colfax v. Richardson*, 664.)

4. ATTACHMENT—LEVY UPON UNOCCUPIED REAL PROPERTY—WHEN VALID.—Under a statute which provides that real property may be attached, where there is no occupant, by leaving a copy of the writ in a "conspicuous" place thereon, a valid attachment of such property may be so made if the officer, at the time of his levy, cannot find anyone visibly occupying the land. (*Bank of Colfax v. Richardson*, 664.)

5. ATTACHMENT—LEVY—"LEAVING COPY" OF WRIT—WHAT IS.—If an officer, in attaching unoccupied real property, is required by statute to leave a copy of the writ in a conspicuous place thereon, it must be held, in a collateral attack upon the judgment in the main action, that the "posting" of the copy in such place is sufficient. (*Bank of Colfax v. Richardson*, 664.)

6. ATTACHMENT—RETURN—SUFFICIENCY OF—ABSENCE OF OCCUPANT.—When real property is attached and the return recites that there was "no occupant thereof on the premises," this is sufficient to show that the premises were unoccupied at the time

they were attached, and the return should not be construed to mean that the premises were actually occupied, but that the occupant was temporarily absent at the time of the officer's visit (Bank of Colfax v. Richardson, 664.)

7. ATTACHMENT—RETURN—SUFFICIENCY OF—OWNER-SHIP OF PROPERTY.—An omission in the return on an attachment of real property to state that the land attached was the property of the defendant in the writ does not render the return insufficient upon a collateral attack. (Bank of Colfax v. Richardson, 664.)

8. ATTACHMENT—RETURN—SUFFICIENCY OF—UNOCCUPIED REAL PROPERTY—LEAVING COPY IN "CONSPICUOUS" PLACE.—When an officer, in attaching real property where there is no occupant, is required by statute to leave a copy of the writ in a "conspicuous" place thereon, and certifies that he has done so, his return is sufficient, when the judgment in the main action is questioned collaterally, without pointing out the particular place where the copy was left. (Bank of Colfax v. Richardson, 664.)

9. ATTACHMENT — TRUSTEE PROCESS — RETURNING GOODS CARRIED TO DISTANT PORT.—When goods of the defendant have been laden on board ship by an alleged trustee, for carriage to a distant port, and the expense and delay attending the unloading of them will be as much as they are worth, the trustee cannot be required at his own risk to transport them to their destination, and then to return them to the port of shipment in order that they may there be taken on execution if the plaintiff recovers judgment against the defendant. (Van Camp etc. Co. v. Plimpton, 296.)

10. ATTACHMENT—TRUSTEE PROCESS—GOODS LOADED FOR SHIPMENT.—If the freight and the expense of unloading the goods and of the delay occasioned to a carrier as trustee, who has been served with process, would have amounted to as much or more than the value of the goods, the trustee is not required to unload the goods so that they may be taken on execution, and he is entitled to be discharged. (Van Camp etc. Co. v. Plimpton, 296.)

See Executions, 1; Judgments, 11.

ATTORNEY AND CLIENT.

See Trial, 1.

BANKRUPTCY.

1. BANKRUPTCY—NATIONAL ACT OF—STATE LAWS.—A national bankruptcy act, from the time it goes into effect, suspends the operation of state insolvency laws, and a state court has no jurisdiction over assignment proceedings, begun after the national act goes into effect. (Harbaugh v. Costello, 147.)

2. BANKRUPTCY—NATIONAL ACT—WHEN TAKES EFFECT.—The provision of the national bankrupt act that the filing of petitions shall be postponed for a stated time does not prevent the act from becoming operative from the date of its passage, and a state insolvency law is superseded from and after that date. (Harbaugh v. Costello, 147.)

3. INSOLVENCY—RIGHT OF HOLDER OF PROMISSORY NOTE MADE BY INSOLVENT—LIABILITY OF MAKER AND INDORSER.—The holder of a note, on which the indorser's liability has become absolute, has the right to prove the full amount against estates in bankruptcy of both maker and indorser, provided no payment from either had been received before proof made; and after

such proof the receipt of dividends from one estate does not cut down the holder's right to receive dividends on the whole amount proved against the other estate. (*Beals v. Mayher*, 367.)

See Corporations, 20-22.

BANKS AND BANKING.

BANKS.—A CERTIFICATE OF DEPOSIT issued by a bank, payable to the order of the depositor "on return of this certificate properly indorsed," is not due immediately, but only upon presentation thereof at the bank with a demand for payment. (*Hillsinger v. Georgia R. R. Bank*, 42.)

See Corporations, 20-22; Husband and Wife, 1.

BASTARDS.

See Descent, 1, 2; Judgments, 16.

BENEFICIARIES.

See Associations, 1; Insurance, 12.

BIGAMY.

BIGAMY—SECOND COMMON-LAW MARRIAGE.—A person who, being married, contracts a common-law marriage lacking the formalities prescribed by statute for the solemnization of marriages, is guilty of bigamy. (*People v. Mendenhall*, 408.)

BONDS.

See Appeal, 1.

BUILDING ASSOCIATIONS.

See Insurance, 15; Judgments, 4.

BURDEN OF PROOF.

See Criminal Law, 3, 4, 8; Fraudulent Conveyances, 2.

CEMETERIES.

REPLEVIN.—A HUMAN CORPSE IS NOT PROPERTY and an action of replevin will not lie for its return. (*Keyes v. Konkell*, 428.)

CHATTEL MORTGAGES.

1. CHATTEL MORTGAGES—RETENTION OF POSSESSION WITH POWER TO SELL IN MORTGAGOR.—A chattel mortgage authorizing the mortgagor to retain possession, with the right to sell a stock of goods mortgaged in the ordinary and usual course of trade, if otherwise good is valid, provided it appears therein that such sales are to be for the benefit of the mortgagee, and that the mortgagor is to account to him for the proceeds of the sales. (*Noyes v. Ross*, 543.)

2. CHATTEL MORTGAGES—RETAINING LIVING EXPENSES TO MORTGAGOR.—A chattel mortgage is not invalid simply because it authorizes one of the mortgagors in possession to retain his necessary living expenses out of the proceeds of sales of the mortgaged property. (*Noyes v. Ross*, 543.)

3. CHATTEL MORTGAGES—SUFFICIENCY OF DESCRIPTION—PAROL EVIDENCE.—A chattel mortgage on a crop of hops, described as growing upon the donation land claim of a person named

in a designated county of the state of Oregon, is sufficiently definite in description to justify the admission of parol testimony, in a controversy between the parties, to identify the property, as, under the donation laws of that state, a person could obtain but one gift of land from the government, and if there was more than one person of the same name who had obtained a donation, the number of the notification and claim would enable a surveyor to locate the premises. In such a case, a partial description, by metes and bounds, given in the mortgage, may be regarded as surplusage. (*Reinstein v. Roberts*, 564.)

4. **CHATTEL MORTGAGES—WHEN NOT AN ASSIGNMENT.** A chattel mortgage on all of the mortgagor's property intended as a lien only, the mortgagor retaining possession and intending to continue in business, and not to convey the title or right of possession, does not operate as an assignment in favor of the mortgagee as a creditor. (*Noyes v. Ross*, 543.)

5. **CHATTEL MORTGAGES—WHEN NOT AN ASSIGNMENT.** The fact that a chattel mortgage upon all of the debtor's property operates to secure certain creditors does not of itself make the security an assignment, where the written contract and the acts thereunder show an intention to give a security only. (*Noyes v. Ross*, 543.)

6. **CHATTEL MORTGAGES.—UNAUTHORIZED** sale of mortgaged chattels by the mortgagee before the maturity of the debt, the mortgagor acquiescing in the sale and the mortgage being otherwise valid, is not fraudulent and void as to other creditors of the mortgagor who had no lien on the property. (*Noyes v. Ross*, 543.)

7. **CHATTEL MORTGAGES—FRAUD ON CREDITORS.**—A chattel mortgage on a stock of goods which are only reasonable security for the debt secured, providing that the mortgagors may remain in possession and sell at retail in the usual way of business for cash, or on a certain limited credit to responsible persons, and account to the mortgagee for the proceeds of the sales, one of the mortgagors being allowed to retain living expenses from such proceeds, is not per se fraudulent as to prior creditors of the mortgagors, nor is it rendered fraudulent by the fact that the mortgagee, in fear of losing the security, sells the stock of goods at auction prior to the maturity of his debt. (*Noyes v. Ross*, 543.)

8. **CHATTEL MORTGAGES—COMPENSATION TO MORTGAGOR—FRAUD.**—The fact that a chattel mortgagor in possession is allowed to draw one hundred dollars per month from the proceeds of the sale of the mortgaged goods from the date of the mortgage to the time of the sale of the goods by the mortgagee is not of itself evidence of fraud in favor of other creditors of the mortgagor. (*Noyes v. Ross*, 543.)

9. **CHATTEL MORTGAGES — PREFERENCES.**—Mortgagors have a right to secure by chattel mortgage a debt honestly due, whether to a relative or not, even when such action leaves nothing for the other creditors, provided the transaction is entered into in good faith, with an honest intention. (*Noyes v. Ross*, 543.)

10. **CHATTEL MORTGAGES.—RELATIONSHIP BETWEEN THE MORTGAGOR AND MORTGAGEE** does not of itself render a chattel mortgage fraudulent or invalid. (*Noyes v. Ross*, 543.)

11. **EVIDENCE, PAROL—IDENTIFICATION OF PROPERTY COVERED BY A CHATTEL MORTGAGE.**—As between a mortgagor and mortgagee of personal property, and also as between such mortgagee and a person who has succeeded to the interest of the mortgagor, with actual notice of the mortgage, parol testimony

is admissible to identify the property which was intended to be given as security. (*Reinstein v. Roberts*, 564.)

See Replevin, 3.

CIRCUMSTANTIAL EVIDENCE.

See Instructions, 9, 11.

CITIZENSHIP.

See Corporations, 19; Mines and Mining, 1, 2.

COLLATERAL ATTACK.

See Attachment, 8; Guardian and Ward, 1, 2; Judgments, 6-12; Public Lands.

COLOR OF TITLE.

See Adverse Possession, 4.

CONFESSION OF JUDGMENT.

See Judgments; Mortgages, 2.

CONFLICT OF LAWS.

See Insurance, 19; Limitation of Actions, 1.

CONSTITUTIONAL LAW.

See Police Power; Statutes; Taxes, 3, 4.

CONTRACTS.

1. **CONTRACTS IN GENERAL RESTRAINT OF TRADE** are void as being against public policy, but contracts in partial restraint of trade are valid and enforceable, if reasonable and supported by a good consideration. (*Lanzit v. Sefton Mfg. Co.*, 171.)

2. **CONTRACTS—RESTRAINT OF TRADE—WHEN UNREASONABLE.**—A contract whereby a manufacturer of paper novelties sells his business and covenants not to engage in such business either directly or indirectly anywhere within the borders of two states is unreasonable and against public policy, where such manufacturer is a resident of one of the states and it does not appear that the restraint was necessary to protect the buyer, since the public is deprived of his industry and he himself is precluded from pursuing his occupation. (*Lanzit v. Sefton Mfg. Co.*, 171.)

3. **CONTRACTS—RESTRAINT OF TRADE—REASONABLENESS.**—Whether a contract in restraint of trade is reasonable or not under all the circumstances of the case is a question to be determined by the court. (*Lanzit v. Sefton Mfg. Co.*, 171.)

4. **CONTRACTS—CANCELLATION—CONSIDERATION FOR NEW CONTRACT.**—If, upon the breach of a contract to deliver merchandise by one party, the other party agrees to accept a fixed quantity and quality of merchandise, at certain times and prices, different from those mentioned in the original contract, this works a cancellation of the old contract, and is a sufficient consideration for the new one. (*Drefus v. Columbian etc. Co.*, 704.)

5. **CONTRACTS—CANCELLATION—CONSIDERATION FOR NEW CONTRACT.**—The mutual, unexecuted undertakings of an

existing contract are a sufficient consideration for the cancellation of such contract and the substitution of a new one with different terms, and it is immaterial if, for a moment during the interval, there is technically a breach of the old agreement, since by the new agreement both parties treat the old one as an existing contract, and mutually agree to a rescission of it. (*Dreifus v. Columbian etc. Co.*, 704.)

See Husband and Wife, 6-8; Insane Persons; Interest, 10, 11.

CONTRIBUTORY NEGLIGENCE.

See Negligence.

CONVERSION.

See Wills, 11.

CORPORATIONS.

1. **CORPORATIONS—POWER TO CONTRACT.**—A street railroad company operating by horse power on the roadbed of a turnpike company has corporate power when it constructs an electric road to enter into a contract with the former company to compensate it for the increased burden placed upon its property. (*Little Saw Mill etc. Co. v. Federal etc. Ry. Co.*, 690.)

2. **CORPORATIONS—CHARACTER—HOW DETERMINED.**—THE UNUSED POWERS of a corporation, as the power to purchase, erect, lease, or sell telegraph and telephone lines, are important in determining the character of a corporation under its charter. (*Inter-Ocean Pub. Co. v. Associated Press*, 184.)

3. **CORPORATIONS—PUBLIC DUTIES—CONTRACT.**—The obligation to serve the public, of a corporation whose business is impressed with a public use, is not one resting on contract, but grows out of the fact that it is in the discharge of a public duty, and this duty cannot be disregarded by a contract stipulation that it should not be liable to discharge such public duty. (*Inter-Ocean Pub. Co. v. Associated Press*, 184.)

4. **CORPORATIONS—NEWS—ASSOCIATED PRESS—PUBLIC USE.**—A corporation known as the Associated Press, organized for the sole purpose of gathering news for sale and publication, has devoted its property to a public use, and it can make no discrimination against persons who wish to purchase information and news, for the purposes of publication, which it was created to furnish. (*Inter-Ocean Pub. Co. v. Associated Press*, 184.)

5. **CORPORATIONS—PROPERTY AS TRUST FUND.**—Property of a corporation is a trust fund to the extent that it must be fairly and honestly applied to the purpose for which it was obtained, and held by virtue of the law creating the corporation, and in case of an express trust created by mutual confidence and contract of the parties, the statute of limitations does not begin to run until the cestui que trust has actual or constructive notice of the repudiation of the trust. (*Crofoot v. Thatcher*, 725.)

6. **CORPORATIONS—PROPERTY AS TRUST FUND—STATUTE OF LIMITATIONS.**—The property of a corporation, including notes for unpaid stock subscriptions, constitutes a trust fund for the benefit of creditors, and creates a right against which the statute of limitations does not begin to run until the beneficiaries have notice of the repudiation of the trust. (*Crofoot v. Thatcher*, 725.)

7. **CORPORATIONS—ASSETS AS TRUST FUND.**—The capital stock and property of a corporation is a trust fund for the payment

of its debts, and the assets of the corporation in the hands of its stockholders are the property of the corporation, and subject to the claims of its creditors. (*Singer v. Hutchinson*, 133.)

8. **CORPORATIONS—PROPERTY AND STOCK.**—The tangible property of a corporation and the shares of stock therein are separate and distinct kinds of property and belong to different owners, the first being the property of the artificial person—the corporation—the latter the property of the individual owner. (*Greenleaf v. Board of Review*, 168.)

9. **CORPORATIONS—STATUTE EXTENDING LIFE OF—CONSTRUCTION.**—A statute providing that corporations, whose charters may have expired, shall continue their corporate capacity for two years for the purposes of collecting debts and selling their property, applies to corporations created after its passage as well as to those then existing. (*Singer v. Hutchinson*, 133.)

10. **CORPORATIONS REPRESENT THEIR STOCKHOLDERS** in bringing and defending suits respecting the rights and obligations of the corporation. (*Singer v. Hutchinson*, 133.)

11. **CORPORATIONS REPRESENT THEIR STOCKHOLDERS** in all matters within the scope of their corporate powers transacted in good faith by the officers of the corporation. (*Singer v. Hutchinson*, 133.)

12. **CORPORATIONS—JUDGMENT AGAINST—CONCLUSIVE-NESS OF—CREDITOR'S BILL.**—In the absence of fraud or want of jurisdiction, a judgment on the merits against a corporation by a creditor is conclusive of the amount of his claim, as against stockholders made defendants to a creditor's bill to reach corporate assets in the hands of such stockholders. (*Singer v. Hutchinson*, 133.)

13. **LIMITATION OF ACTIONS—STOCKHOLDERS' LIABILITY—CALL OR DEMAND.**—Stock notes payable by their terms on demand, made under the authority of a statute permitting one-half of the capital stock of a joint stock insurance company to be evidenced by the notes of the stockholders are not payable, and the statute of limitations does not begin to run against them until an actual call or demand has been made, or the corporation has been adjudged insolvent. (*Crofoot v. Thatcher*, 725.)

14. **CORPORATIONS—UNPAID SUBSCRIPTIONS—STATUTE OF LIMITATIONS—DEMAND.**—Unpaid subscriptions to the capital stock of a corporation are a trust fund, and the statute of limitations has no application thereto, and does not begin to run until an actual call or demand of payment is made, or until the corporation is adjudged insolvent. (*Crofoot v. Thatcher*, 725.)

15. **CORPORATIONS—LIABILITY OF DIRECTORS.**—Directors of a corporation are not merely bound to be honest; they must also be diligent and careful in the performance of duties they have undertaken. They cannot excuse imprudence on the ground of their ignorance or inexperience, or the honesty of their intentions; and if they commit an error of judgment through mere recklessness or want of ordinary prudence or skill, they may be held liable for the consequences. (*Warren v. Robison*, 734.)

16. **CORPORATIONS—LIABILITY OF DIRECTORS.**—If directors of a corporation, acting in good faith and with reasonable care, skill, and diligence, nevertheless fall into a mistake, either of law or fact, causing financial loss, they cannot be held personally liable for the consequences thereof. (*Warren v. Robison*, 734.)

17. CORPORATIONS—LIABILITY OF DIRECTORS—DELEGATION OF AUTHORITY.—If the board of directors of a corporation delegate its business and the whole management and control thereof to its executive officers, they cannot, when disaster to the stockholders and creditors ensues through carelessness and mismanagement avoid personal liability on the ground that they did not know of the unfortunate transactions, and were ignorant of the business. (*Warren v. Robison*, 734.)

18. CORPORATIONS—LIABILITY OF DIRECTORS—USE OF CARE AND PRUDENCE.—The directors of a corporation in administering its affairs must exercise ordinary care, skill, and diligence. They must give the business under their care such attention as an ordinarily discreet business man would give to his own concerns under similar circumstances, and it is incumbent upon them to devote so much of their time to their trust as is necessary to familiarize them with the business of the institution and direct its operations. (*Warren v. Robison*, 734.)

19. CORPORATIONS—CITIZENSHIP.—A corporation organized under the laws of a state is a citizen of that state. (*Wilson v. Triumph etc. Co.*, 718.)

20. CORPORATIONS—INSOLVENT NATIONAL BANK—LIABILITY OF STOCKHOLDER—PREFERENCES.—If a stockholder in a national bank dies subsequent to the insolvency of the bank, but before any assessment is made on his stock on account of such insolvency, and after his death an assessment equal to the full value of his stock is made upon the administrator of his estate, and when his estate is insolvent, such assessment is not entitled to be given a preference over the claims of the general creditors of the estate. (*Estate of Beard*, 882.)

21. CORPORATIONS—INSOLVENT NATIONAL BANK—LIABILITY OF STOCKHOLDER—PREFERENCES.—The statutory liability of a stockholder of a national bank to pay toward its debts a sum equal to the face value of his stock, is not entitled to preferential payment out of the funds of the insolvent debtor. (*Estate of Beard*, 882.)

22. CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDER—PREFERENCES.—The assets of an insolvent stockholder in an insolvent national bank, whether living or dead, are not, as against his other creditors, subject to a preferential claim for the payment of his statutory liability for the debts of the bank for an amount equal to the par value of his stock. (*Estate of Beard*, 882.)

23. CORPORATIONS—SEAL—PRESUMPTION.—If the common seal of a corporation is affixed to an instrument and the signatures of the proper officers are proved, it is presumed that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority. (*Little Saw Mill etc. Co. v. Federal etc. Ry. Co.*, 690.)

See *Creditor's Bill*, 3, 4; *Insurance*, 19; *Receivers*, 1; *Taxes*, 1.

COTENANCY.

See *Fraudulent Conveyances*, 7, 9.

COUNTIES.

MUNICIPAL CORPORATIONS.—Counties are municipal corporations within the meaning of a statute providing for actions against municipal corporations to recover back taxes wrongfully collected. (*Kelley v. Rhoads*, 904.)

See *Estoppel*, 3; *Interest*, 12-14; *Officers*.

COURTS.

See Associations, 4, 5; Jurisdiction, 1.

CREDITOR'S BILL.

1. CREDITORS' BILLS — ABATEMENT BY DEATH.—The death of the debtor extinguishes the right of the creditor to prosecute a pending creditor's bill, when no lien exists. (*Beith v. Porter*, 402.)

2. CREDITORS' BILLS—LIEN OF.—The mere filing of a creditor's bill does not of itself give the complainant a lien upon the property as against the other creditors. (*Beith v. Porter*, 402.)

3. CORPORATIONS—CREDITOR'S BILLS AGAINST—PARTIES.—A judgment creditor of a corporation, in proceeding by creditor's bill to reach assets of the corporation in the hands of its stockholders, need not make all of such stockholders parties. (*Singer v. Hutchinson*, 133.)

4. CORPORATIONS—CREDITOR'S BILLS AGAINST—CROSS-BILL—PARTIES.—Upon filing a creditor's bill against part of the stockholders in a corporation to reach corporate assets in their hands, the defendants, if they desire an equitable distribution of the burden among all of the stockholders, should file a cross-bill, or may file an original bill in an independent action, and the fact that all of the stockholders were originally joined in the creditor's bill does not excuse the filing of such cross-bill, if the bill was subsequently dismissed as to part of them. (*Singer v. Hutchinson*, 133.)

See Corporations, 12.

CRIMINAL LAW.

1. CRIMINAL LAW.—ALIBI AS A DEFENSE NEED NOT BE PROVED by a preponderance of the evidence. Evidence only tending to prove it permits its consideration as raising a reasonable doubt as to the guilt of the accused. (*State v. McClellan*, 558.)

2. CRIMINAL LAW—ALIBI.—EVIDENCE of an alibi is competent under a plea of not guilty. (*State v. McClellan*, 558.)

3. CRIMINAL LAW—ALIBI—BURDEN OF PROOF.—Alibi is not a special defense changing the presumption of innocence, or relieving the prosecution of its burden of proving the guilt of the accused beyond a reasonable doubt. (*State v. McClellan*, 558.)

4. CRIMINAL LAW—ALIBI—BURDEN OF PROOF.—The burden of proof is not changed by the defense of an alibi, and if the evidence of the accused upon that point raises a reasonable doubt of his guilt, the jury must acquit, although not satisfied that the alibi is clearly established as a fact. (*State v. McClellan*, 558.)

5. CRIMINAL LAW — DISORDERLY CONDUCT.—Where a man and woman in an intoxicated condition are riding on a street-car, using profane language and hugging and kissing each other, there being other females on the car, this is indecent and disorderly conduct in the presence of females, though the female passengers may not have seen or heard such conduct. (*Sailors v. State*, 17.)

6. CRIMINAL LAW—NEGLECT TO SUPPORT FAMILY.—Under a statute providing that all persons who, being of sufficient ability, refuse or neglect to support their families, or who leave their wives or children a burden on the public, shall be deemed to be disorderly persons, a person who neglects or refuses to support his family may be validly convicted of being a disorderly person, although such family does not become a burden upon the public. (*People v. Malsch*, 381.)

7. **INSANITY AS DEFENSE TO CRIME—IRRESISTIBLE IMPULSE.**—A person who commits a crime under an irresistible impulse resulting from overpowering mental disease, and which is beyond his control, is not criminally responsible therefor. (State v. Peel, 529.)

8. **INSANITY AS DEFENSE TO CRIME — BURDEN OF PROOF.**—The burden of establishing the defense of insanity by a preponderance of the evidence is never cast upon the accused, and the legal presumption of sanity is rebutted and disappears whenever sufficient proof is introduced by either side to raise a reasonable doubt of the sanity of the accused. The burden is then cast upon the prosecution to establish the guilt of the accused beyond such reasonable doubt. (State v. Peel, 529.)

9. **INSANITY AS DEFENSE TO CRIME.**—Insanity in the criminal law as a defense to crime is any defect, weakness, or disease of the mind, rendering it incapable of entertaining, or preventing its entertaining in the particular instance, the criminal intent which constitutes one of the elements in every crime. In the formation of this intent there must concur knowledge or intellectual comprehension and the power of choice, and if there is no intent there is no crime. (State v. Peel, 529.)

10. **INSANITY AS DEFENSE TO CRIME.**—A person may have mental capacity and intelligence sufficient to distinguish between right and wrong with reference to the particular act in question, and to understand the consequences of its commission, and yet be so far deprived of volition and self-control by the overwhelming violence of mental disease that he is not capable of voluntary action, and therefore not able to choose between right and wrong, and hence incapable of entertaining the intent necessary to constitute a crime. (State v. Peel, 529.)

11. **INSANITY AS DEFENSE TO CRIME—IRRESISTIBLE IMPULSE.**—If, on a trial for homicide, insanity is pleaded as a defense, the court need not charge on the effect of irresistible homicidal impulse, when the only evidence of such impulse is defendant's statement that a few minutes before the killing he was attacked with a dizzy spell, and had no recollection of what occurred thereafter until the next day. His act must then have been the result of unconsciousness or delirium, while irresistible impulse implies knowledge of right and wrong in some degree. (State v. Peel, 529.)

12. **INSANITY AS DEFENSE TO CRIME—IRRESISTIBLE IMPULSE.**—To be criminally responsible, a man must have reason enough to be able to judge of the character and consequence of the act committed, and he must not have been overcome by an irresistible impulse arising from disease affecting the mind. (State v. Peel, 529.)

13. **INSANITY AS DEFENSE TO CRIME—IRRESISTIBLE IMPULSE** leading to homicide in an insane person is a good defense, though such insane person was able to distinguish between right and wrong, but with the sane person such impulse is not a defense. (State v. Peel, 529.)

14. **CRIMINAL LAW—FORMER JEOPARDY—RESENTENCE.** A person, who has been sentenced by a court having jurisdiction of the offense and of the person, and who has served a substantial portion of the time for which he was sentenced, can be resentenced if, on appeal by him, it is determined that the original sentence was unlawful; and such sentence does not put the defendant in jeopardy twice, or constitute a second punishment for the same offense. (Commonwealth v. Murphy, 353.)

15. CRIMINAL LAW—FORMER JEOPARDY—DEMURRER TO PLEA OF.—If a person charged with forging a note offers as a plea in bar his previous trial and acquittal of uttering and having in his possession such note, and the prosecution enters a demurrer to such plea, the sufficiency of the plea is a question of law for the court to decide. (*State v. Williams*, 441.)

16. CRIMINAL LAW—FORMER JEOPARDY—DEMURRER TO PLEA OF.—If a plea of former conviction or acquittal on its face shows that the defendant is not indicted for the offense described in the special plea, a demurrer to such plea is proper practice. (*State v. Williams*, 441.)

17. CRIMINAL LAW—FORMER JEOPARDY.—If one offense is a necessary element in and constitutes an essential part of another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to a prosecution of the other. (*State v. Williams*, 441.)

See Accomplices; Forgery; Instructions, 7-11; Trial.

CROPS.

See Executions, 2; Landlord and Tenant, 11.

CURTESY.

ESTATES—CURTESY.—RIGHT OF SEISIN during coverture is essential to an estate of curtesy initiate. If the remainderman dies before the life tenant, the husband of such remainderman cannot claim an estate by curtesy in his wife's land after the death of the tenant for life. (*Cox v. Boyce*, 483.)

DAMAGES.

See Municipal Corporations, 1; New Trial, 8; Replevin, 4.

DAMS.

See Municipal Corporations, 2.

DANGEROUS PREMISES.

See Municipal Corporations, 8-10; Negligence, 4.

DEAD BODIES.

See Cemeteries.

DEEDS.

1. DEEDS—ACKNOWLEDGMENT OF MUST COMPLY WITH STATUTORY FORM.—To authorize the admission of a deed to record, its acknowledgment, and the certificate thereof, must substantially comply with the form prescribed by statute. (*Hurst v. Leckie*, 798.)

2. EVIDENCE—OMISSIONS IN ACKNOWLEDGMENT OF DEED CANNOT BE SUPPLIED BY PAROL.—As the acknowledgment of a deed, and the certificate thereof, must contain, substantially, all the requisites of the form prescribed by statute, no omission therein can be supplied by parol evidence. (*Hurst v. Leckie*, 798.)

3. ACKNOWLEDGMENT OF DEED, AND CERTIFICATE—WHEN SUFFICIENT.—If a deed is entitled to record upon being

acknowledged before "a commissioner in chancery of a court of record," and, under the laws of the state, there are no such officers except commissioners in chancery of the circuit and corporation courts, which are courts of record, a deed should be admitted to record where its certificate of acknowledgment defines the territorial jurisdiction of the officer taking it to have been a city named, certifies in the body thereof that it was made before him as a commissioner in chancery for such city, and is subscribed by him as a commissioner in chancery, and where there was no circuit court at the time for such city. A commissioner in chancery, whose territorial jurisdiction was limited to that city, was plainly a commissioner in chancery of the corporation court of that city, and the certificate, therefore, shows on its face that he was a person authorized by law to take acknowledgments to deeds. (*Hurst v. Leckie*, 798.)

4. **DEEDS—DELIVERY TO THIRD PERSON.**—Acceptance of a deed by the grantee relates back to the time of its delivery to a third person for him, although he was not then aware of its execution, if he had assented thereto, and no rights of third parties had intervened. (*Clark v. Clark*, 115.)

5. **DEEDS.—DELIVERY OF A DEED** by the grantor to a third person, with directions to deliver it to the grantee when he shall call for it, is a valid and sufficient delivery although the grantor, several days subsequent thereto, takes the deed from the depository and himself hands it to the grantee. In such case, the delivery to the grantee relates back to the delivery to the depository, unless the rights of third parties have intervened. (*Clark v. Clark*, 115.)

6. **DEEDS—NECESSITY OF RECORDING.**—The duty of a grantee is to promptly record the evidence of his title, and if he fails to do so, he must bear the loss that his neglect has occasioned. (*Price v. Wall*, 788.)

7. **DEEDS.—AN UNRECORDED DEED IS VOID** as to all creditors who, but for the deed, would have a right to subject the property conveyed to their debts, whether they were contracted before or after the date of the deed. (*Price v. Wall*, 788.)

8. **DEEDS—LIFE ESTATE—REMAINDERS—REVERSIONS.**—A deed granting a life estate and containing the words "and at her death to revert back to my heirs," is the grant of a life estate only, and no remainder being created, the fee remains vested absolutely in the grantor, and upon the death of the life tenant, the property reverts to the grantor or his heirs. The grantor being a reverser in point of time can dispose of the fee absolutely by will or by deed. (*Akers v. Clark*, 152.)

See *Fraudulent Conveyances*, 4, 5; *Gifts*, 2.

DEFINITIONS.

DEFINITIONS.—THE TERM "BONA FIDE PURCHASERS" in recording acts does not include a judgment creditor. (*Dawson v. McCarty*, 841.)

"Family." (*Bellstein v. Bellstein*, 692.)

"Month." (*Daley v. Anderson*, 870.)

DEMURRER.

See *Criminal Law*, 15, 16.

DESCENT.

1. **ILLEGITIMATE CHILDREN—INHERITANCE BY AND FROM.**—The right of an illegitimate child to inherit property, and of legitimates to inherit from him, is entirely dependent upon statute, and cannot exist in any case which does not come within the statute. (*Hudnall v. Ham*, 124.)

2. **ILLEGITIMATE CHILDREN—COLLATERALS.**—A statute providing that the estate, real and personal, of an illegitimate child shall descend to and vest in the widow or surviving husband and children confers no right upon collateral heirs, and the children of the mother of an illegitimate child can claim under such statute only when there is no widow. (*Hudnall v. Ham*, 124.)

See Adoption, 4; Devise, 4.

DEVISES.

1. **WILLS—DEVISE OVER—"FAMILY."**—A devise over in case the devisee should die "without leaving a family" is an implied devise to the family of the devisee if she should leave one. (*Bellstein v. Bellstein*, 692.)

2. **WILLS—GIFT OF INCOME.**—A devise of the income of land is a gift of the land itself. (*Bellstein v. Bellstein*, 692.)

3. **WILLS—"DIE WITHOUT LEAVING FAMILY"—MEANING OF.**—A devise to a daughter of the income of land "as long as she lives, but should she die without leaving a family," then over, means death without issue or heirs of her body, and refers to an indefinite failure of issue creating a fee tail in the first taker, enlarged to a fee simple by statute. (*Bellstein v. Bellstein*, 692.)

4. **WILLS—LAWS OF DESCENT.**—A DEVISE giving precisely the same estate and interest in property as the devisee would take by descent if the devise had not been made is void, for the reason that a title by descent is regarded as a better title than by devise or purchase. (*Akers v. Clark*, 152.)

DISORDERLY CONDUCT.

See Criminal Law, 5.

DIVORCE.

See Marriage and Divorce.

DOMICILE.

INFANTS—DOMICILE OF.—If a father has surrendered his child to her grandfather and the latter stands in loco parentis toward her, the residence of the grandfather is the residence of such child. (*Cox v. Joyce*, 483.)

See Guardian and Ward, 1.

DOWER.

1. **DOWER—CONVEYANCE BEFORE MARRIAGE—FRAUD.** A deed executed the day previous to the grantor's marriage is not in fraud of his wife's inchoate right of dower, if she, with full knowledge of such deed, accepts a life estate in other property of the husband equal to her dower and homestead interests. (*Clark v. Clark*, 115.)

2. **DOWER.—WHETHER AN ANTENUPTIAL CONTRACT** is sufficient to bar or release the widow's dower is immaterial, if she

is sole heir and no question of homestead is involved. (*Hudnall v. Ham*, 124.)

See Marriage and Divorce, 7.

EASEMENTS.

EASEMENTS—RIGHTS OF WAY—REMOVAL OF OBSTRUCTION.—One of the owners in common of a right of way in an alley, who erects an obstruction on his part, beneficial to himself alone, but not incommoding his abutting owner, cannot be compelled to remove such obstruction. (*Moon v. Mills*, 590.)

See Adverse Possession, 3.

EJECTMENT.

1. EJECTMENT—IMPROVEMENTS—GOOD FAITH OCCUPANCY, accompanied by color of title entitling the defendant in ejectment to recover compensation for improvements in case of plaintiff's recovery means simply an honest belief of the occupant in his right or title, and the fact that diligence might have shown him that he had no title does not necessarily negative good faith in his occupancy. (*Petit v. Flint etc. R. R. Co.*, 417.)

2. EJECTMENT—VALUE OF IMPROVEMENTS—HOW ESTIMATED.—The value of improvements to which a good faith occupant is entitled upon ejectment is to be determined by the actual relative value of the land with or without the improvements, and not by their cost or peculiar value to the occupant, or what they may be worth to the plaintiff for the purposes to which he intends to devote the property. (*Petit v. Flint etc. R. R. Co.*, 417.)

3. ESTOPPEL—TITLE TO LAND.—Plaintiff's title in an action of ejectment is not defeated by evidence that the executors of his ancestor conveyed the premises, received full value therefor, and that the money was disbursed for the benefit of the heirs, including plaintiff. (*Petit v. Flint etc. R. R. Co.*, 417.)

See Mortgages, 2.

ELECTRIC COMPANIES.

ELECTRIC LIGHT COMPANIES—INJURY TO LINEMAN OF TELEPHONE COMPANY—LIABILITY.—In an action by a lineman of a telephone company for injuries received from contact with an uninsulated wire charged with electricity belonging to an electric light company while upon the roof of a building, it is not sufficient to show that the defendant had reasonable cause to expect that the plaintiff would go rightly or wrongly on roofs covered by its wires, but the plaintiff must show that the defendant had invited or licensed him to go where he was when he was injured. (*Hector v. Boston Electric Light Co.*, 300.)

EQUITABLE CONVERSION.

See Wills, 11.

EQUITY.

See Highways, 3; Landlord and Tenant, 3.

ESTATES OF DECEDENTS.

See Executors and Administrators.

ESTOPPEL.

1. **ESTOPPEL—EQUITABLE** estoppel preventing a person from asserting his legal rights to property must involve some degree of moral turpitude in the conduct of such person, which has misled others to their injury; conduct or declarations founded upon ignorance of one's rights does not constitute such estoppel. (*Smith v. Sprague*, 384.)

2. **ESTOPPEL—LANDLORD AND TENANT.**—A landlord who, without objection, permits a tenant, after his surrender of the premises, to cut a crop planted by him and growing thereon, and thereafter attaches it for rent due, is not estopped from asserting title to the crop, as against the tenant or his transferee, if the landlord acted in ignorance of his legal rights. (*Smith v. Sprague*, 384.)

3. **ESTOPPEL—COUNTY IS NOT ESTOPPED BY THE UNAUTHORIZED ACTS OF ITS AGENTS.**—If a board of county commissioners agrees with the county superintendent of schools to pay him a certain amount for each school visited, and audits and allows a claim for such services, when it is without authority to make such a contract, because restricted by the constitution, and when it has no authority to audit and allow such claim because the statute directing its allowance is invalid, the county is not estopped, by such unauthorized acts of its agents, from questioning the validity of county warrants issued in payment of the claim. (*Chehalis County v. Hutcheson*, 818.)

4. **ESTOPPEL—PERMITTING ERECTION OF BUILDING.** A property owner who stands and permits a building to be erected over an adjoining alley and into and against his own building, demanding no compensation and offering no objection thereto until six years thereafter, and during that time living on his adjoining property, is estopped from denying that he consented to the manner of building the adjoining house. (*Redmond v. Excelsior Sav. etc. Assn.*, 714.)

5. **ESTOPPEL—VOID CONTRACT CANNOT CREATE.**—A contract void as against public policy cannot create an estoppel. Hence, an agreement between two persons that one of them shall make a contract with a third person for the benefit of the other, which contract would be unlawful, cannot create an estoppel to a claim against the intended beneficiary, who has received from such third person the fruits of a lawful contract substituted for that which would have been unlawful. (*Tate v. Commercial Building Assn.*, 770.)

See Ejectment, 3; Executions, 4, 5; Mortgages, 2.

EVIDENCE.

1. **FOREIGN LAWS—LAW MERCHANT IN TURKEY—PRESUMPTION.**—There is no presumption that the law merchant, with its customs relative to protest and notice, prevails in Turkey, and such law cannot be resorted to in determining the probable construction of a contract collateral to a draft which is payable in that country. (*Aslanian v. Dostumian*, 348.)

2. **EVIDENCE—PHOTOGRAPHS.**—The weight to be given to a photograph as evidence depends on the character of the thing shown in evidence and the skill of the person taking the photograph. (*Baustian v. Young*, 462.)

3. **EVIDENCE—PHOTOGRAPHS—INSTRUCTIONS.**—If a photograph is admissible in evidence for one purpose only, the court may so instruct the jury and limit consideration to that purpose. (*Baustian v. Young*, 462.)

4. EVIDENCE.—PHOTOGRAPHS ARE NEVER ADMISSIBLE except as secondary evidence. (*Baustian v. Young*, 462.)

5. EVIDENCE.—PHOTOGRAPHS ARE NOT ADMISSIBLE in evidence until it is proved by evidence aliunde to be a true photographic print of the thing in question at a particular time. (*Baustian v. Young*, 462.)

6. EVIDENCE.—PHOTOGRAPHS.—A photograph taken several days after the occurrence has not precisely the same influence or weight as evidence as one taken in the moment of the act it purports to portray. (*Baustian v. Young*, 462.)

7. EVIDENCE.—PHOTOGRAPHS of themselves are of the same character of evidence as diagrams and pictures drawn by hand, not necessarily carrying the same degree of probative force, but still of the same character, not in themselves evidence at all, but representing to the eye what the witness declares was the real appearance of the thing at the time he saw it. (*Baustian v. Young*, 462.)

8. EVIDENCE — WHAT CIRCUMSTANCES ARRANGED "LINKWISE" MUST BE PROVED BEYOND A REASONABLE DOUBT.—It is not necessary that each essential fact in a chain of circumstances solely relied on to connect the accused in a criminal case with the commission of an offense, when separately considered, should be found beyond a reasonable doubt, as one essential fact may derive such support from others immediately connected therewith as to exclude all doubt of its existence; but, if a conviction depends entirely on different circumstances, arranged linkwise, connecting the defendant with the crime charged, then each and every one of these must be established beyond a reasonable doubt. (*State v. Cohen*, 213.)

9. EVIDENCE—MINOR CIRCUMSTANCES OF THOSE ARRANGED "LINKWISE"—QUANTUM OF PROOF REQUIRED.—While each and every ultimate and essential fact necessary to a conviction in a criminal case must be established beyond a reasonable doubt, where a conviction depends entirely on different circumstances, arranged linkwise, connecting the defendant with the crime charged, yet it is not necessary that the minor circumstances relied on by the state to establish such ultimate and essential facts should be proved with the same degree of certainty, as some of these may fail of proof, and yet those essential to conviction be found from other evidence beyond a reasonable doubt. (*State v. Cohen*, 213.)

10. EVIDENCE, SECONDARY.—A COPY OF A COPY of an insurance policy is not admissible as secondary evidence in the absence of any reason given why the copy from the original is not produced. (*State v. Cohen*, 213.)

See Appeal, 8, 9, 19, 20; Chattel Mortgages, 11; Criminal Law, 2, 3; Deeds, 2; Fraudulent Conveyances, 2, 3; Guaranty, 1; Instructions, 9, 11; Insurance, 1, 8, 10; Judgments, 13; Municipal Corporations, 14, 15; New Trial, 2; Replevin, 2, 3; Statutes, 3, 5, 6; Suretyship, 3; Trial, 5, 7; Witnesses.

EXECUTIONS.

1. EXECUTIONS.—ATTACHMENT OR EXECUTION CREDITORS succeed to and acquire only the rights of the debtor, but a purchaser for value and without notice may acquire greater rights and a higher title than his vendor possessed. (*Yank v. Bordeaux*, 522.)

2. **EXECUTION.—A GROWING CROP** is not subject to levy under execution against a tenant, where it was planted by him under an agreement with his landlord that the tenant should properly care for, harvest, and deliver to the owner a certain portion of the product. (*Tipton v. Martzell*, 838.)

3. **JUDICIAL SALE—DORMANT EXECUTIONS.**—A sale by a sheriff under a dormant *feri facias* is absolutely void, and the failure of the defendant to appear at such sale after notice does not estop him from making a subsequent attack on the validity of the sale, when he is sought to be dispossessed by one who claims title under the deed made by the sheriff. (*Davis v. Comer*, 33.)

4. **EXECUTION SALES—INTEREST SOLD—ESTOPPEL.**—If a sheriff attaches and sells, in compliance with statute, all the right, title, and interest of the defendant in land, the purchaser gets all interest of the defendant and not simply the equity of redemption, and the statement in the notice of sale, that such sale is made subject to all prior liens and judgments, does not affect the purchaser's right to contest the validity of a trust deed on the property made to hinder and delay creditors. (*Huffman v. Nixon*, 454.)

5. **EXECUTION SALES—ESTOPPEL.**—The belief of a purchaser of all of defendant's interest in land at an execution sale, at the time of the sale and for a long time afterward, that a deed of trust on the property was valid, and his conduct in relation thereto does not estop him from afterward contesting the validity of such deed with the maker or those claiming under him. (*Huffman v. Nixon*, 454.)

6. **EXECUTION—COMPELLING OFFICER TO MAKE RETURN.**—Neither of the parties to a suit can be deprived of the benefit of a return, on a writ of execution, by the officer's neglect or failure to return the writ by the return day, and, if he fails to do so, he may be compelled, by process of contempt, or by a proceeding subjecting him to forfeitures and penalties, to make a return upon the writ and to return it. (*Rowe v. Hardy*, 811.)

7. **EXECUTION—RIGHT TO CONTROL.**—In executing a writ of *feri facias*, the sheriff is the agent of the plaintiff, who is entitled to its proceeds. Hence, the plaintiff and his attorneys have the right to control the execution and to say whether the officer shall levy it or return it without doing so. (*Rowe v. Hardy*, 811.)

8. **EXECUTION.—THE FAILURE TO RETURN A WRIT OF FIERI FACIAS ON THE RETURN DAY** does not destroy the legal effect of the return indorsed upon it. The record is not complete until the writ is returned, but when a proper return of the writ is made, though after the return day, such return is thenceforth competent evidence of the facts therein stated. (*Rowe v. Hardy*, 811.)

9. **EXECUTION—RETURN WITHOUT DATE—PRESUMPTION.**—A return without date, made on an execution, is presumed to have been made while the sheriff had the right to make it, and in due time. (*Rowe v. Hardy*, 811.)

10. **EXECUTION—CONCLUSIVENESS OF RETURN.**—A sufficient return upon an execution is conclusive between the parties. (*Rowe v. Hardy*, 811.)

EXECUTORS AND ADMINISTRATORS.

1. **EXECUTORS AND ADMINISTRATORS—DECREE OF SALE—STATUTE OF LIMITATIONS.**—An order for the sale by an executor of a decedent's property for the payment of debts cannot be set aside. (*Am. St. Rep.*, Vol. LXXV.—82)

not be regarded as a judgment at law or a decree in chancery for the payment of money, but it is a decree in rem, and will remain in force, so that the executor may sell the property, for more than seven years. (*Kipping v. Demint*, 164.)

2. EXECUTORS AND ADMINISTRATORS—RIGHT TO RECOVER PROPERTY FRAUDULENTLY CONVEYED.—Equitable assets, including land fraudulently conveyed, or held in trust for creditors, may be recovered by an administrator of the fraudulent grantor, and are assets in his hands for even an impartial distribution to the creditors. (*Beith v. Porter*, 402.)

3. ESTATES OF DECEDENTS—PREFERENCES.—Although the entire assets of an intestate are held by the administrator in trust for the payment of the debts of the intestate, this does not give to any particular debt preference in payment over any other debt. (*Estate of Beard*, 882.)

EXEMPLARY DAMAGES.

See *Replevin*, 4.

EXPECTANCIES.

INHERITANCE—ASSIGNMENT OF CONTINGENT INTERESTS.—Contingent interests and expectancies, and things having no present existence, but which rest only in possibility, may, by contract, bona fide made and for a sufficient consideration, be assigned so as to be binding in equity. (*Hudnall v. Ham*, 124.)

EXPERT TESTIMONY.

See *Witnesses*, 13-15.

FIERI FACIAS.

See *Executions*, 3.

FINDINGS.

See *Appeal*, 2, 3.

FOREIGN LAW.

See *Evidence*, 1.

FORGERY.

CRIMINAL LAW—FORMER JEOPARDY—DISTINCT OFFENSES—FORGERY.—If a person is charged with having uttered and having in his possession a forged note, his acquittal on such charge is not a bar to his subsequent trial under a charge of having forged such note. The two indictments charge separate and distinct crimes of which neither is merely a degree of the other. (*State v. Williams*, 441.)

See *Indictment*.

FORMER JEOPARDY.

See *Criminal Law*, 14-18; *Forgery*.

FRANCHISES.

1. CONSTITUTIONAL LAW.—A FRANCHISE is a special privilege granted by the state, which does not belong to citizens of

the country, generally by common right. Such is the meaning of the word "franchise" in a constitutional provision prohibiting the passage of any special law granting any special franchise to any corporation, association, or individual. (*Lasher v. People*, 103.)

2. **CONSTITUTIONAL LAW — FRANCHISES — APPOINTMENT TO OFFICE.**—The power to appoint to a public state office is a franchise, and cannot be granted by the legislature to a private corporation or set of corporations, under a constitutional provision prohibiting the passage of any special law granting any special franchise to any corporation. (*Lasher v. People*, 103.)

FRAUD.

See Chattel Mortgages, 7, 8; Dower, 1; Judgments, 13-15; Limitation of Actions, 2, 3; Maxims; Mortgages, 2, 4; Sales, 6, 7; Vendor and Purchaser, 2-5.

FRAUDULENT CONVEYANCES.

1. **FRAUDULENT CONVEYANCE BETWEEN RELATIVES—INSUFFICIENT EVIDENCE OF.**—Land conveyed to a father in law by his son in law, who held the title, though the deed was executed pending litigation with a third person and during the trial of the cause, cannot be subjected to the payment of a judgment against the grantor, on the ground that the conveyance was fraudulent, where it appears that the sale had long been contemplated; that the purchase was made for a son of the grantee; that the grantor intended to leave the state; that an adequate consideration was paid; that the father in law had originally bought the land and allowed the title to be taken in the name of his son in law, but that the latter had never paid anything on the purchase price; and that it was uncertain whether a judgment in the suit mentioned would ever be recovered against the grantor. (*Conry v. Benedict*, 282.)

2. **FRAUD—TRANSACTION BETWEEN RELATIVES—PRESUMPTION—PROOF.**—When a transaction between relatives is attacked by one of the grantor's creditors as fraudulent, fraud will not be imputed to the parties because of the relationship alone, but the plaintiff must establish it, or prove a state of facts from which fraud may be inferred. (*Conry v. Benedict*, 282.)

3. **FRAUDULENT CONVEYANCES—GOOD FAITH—BURDEN OF PROOF.**—If a conveyance from an insolvent debtor to his children and the circumstances under which it was made bear the semblance of an attempt to cover up the grantor's property, and his creditors bring suit to set aside the conveyance as a fraud upon them, the burden is upon the defendants to show that the conveyance was made in good faith and for a valuable consideration, particularly where they ought to be able to point out definitely the various items going to make up the indebtedness constituting the alleged consideration for the conveyance. (*Bank of Colfax v. Richardson*, 664.)

4. **FRAUDULENT CONVEYANCES.—A DEED OF TRUST made to hinder and delay creditors, although recorded before the levy of an attachment, is fraudulent and void as to such attachment creditors.** (*Huffman v. Nixon*, 454.)

5. **FRAUDULENT CONVEYANCES—DEED OF TRUST—ATTACHMENT—PRIORITY.**—If a deed of trust made to hinder and delay creditors is recorded before the levy of an attachment, but not received by the cestui que trust until after the attachment is levied and an abstract thereof recorded upon the land described in

the deed, the title of the purchaser at the execution sale under the attachment is prior to any right or interest conveyed by the trust deed. (*Huffman v. Nixon*, 454.)

6. **FRAUDULENT CONVEYANCES—CHANGE OF POSSESSION—NOTICE OF.**—If a third person purchases the interest in personalty of one of the joint owners thereof while it is in their possession, and it is afterward levied upon under execution against the seller, the failure of the plaintiff to notify the officer making the levy and the seller's creditors of the sale, prior to the levy, does not preclude him from recovering the property. (*Yank v. Bordeaux*, 522.)

7. **FRAUDULENT CONVEYANCES—NOTICE OF CHANGE OF POSSESSION—JOINT OWNERSHIP.**—If one of several joint owners of personalty sells his interest therein, the purchaser need not notify the other joint owners of the sale in order to make it valid against execution creditors of the seller. (*Yank v. Bordeaux*, 522.)

8. **FRAUDULENT CONVEYANCES—CHANGE OF POSSESSION—PRESUMPTION.**—The conclusive presumption created by statute, that a transfer of personal property, in the absence of an immediate delivery and actual and continued change of possession of the subject of the transfer, is fraudulent and void as to the creditors of the person making the transfer, is to be indulged only when the person making the transfer has at the time the possession and control of the property. It does not apply to a transfer by one joint owner of his share in property in the exclusive possession of his joint owner. (*Yank v. Bordeaux*, 522.)

9. **FRAUDULENT CONVEYANCES—CHANGE OF POSSESSION—JOINT OWNERSHIP.**—If a joint owner of personalty in possession of another joint owner sells his interest, the purchaser's failure to take possession does not, as against execution creditors of the seller, avoid the sale. (*Yank v. Bordeaux*, 522.)

See Assignment for Benefit of Creditors, 2, 3, 6; Attachment, 2; Executors and Administrators, 2; Limitation of Actions, 4.

GIFTS.

1. **GIFTS BENEFICIAL TO THE DONEE ARE PRESUMED** to have been accepted. (*Holmes v. McDonald*, 430.)

2. **GIFTS—DEEDS OF.—RECORDING** a deed of gift with intent to pass title is a sufficient delivery. (*Holmes v. McDonald*, 430.)

3. **GIFTS TO BE VALID MUST BE EXECUTED**, and there must be such delivery from the donor to the donee as places the property within the dominion and control of the latter, with intent to transfer the title to him. (*Holmes v. McDonald*, 430.)

4. **GIFTS INTER VIVOS.—TO CONSTITUTE** a gift inter vivos, there must be a delivery of the thing given, either actual or constructive. (*Holmes v. McDonald*, 430.)

5. **GIFTS INTER VIVOS—REVOCATION.**—A recorded mortgage executed to a father by his son, providing for the payment by the son to the father of an annual sum during his life and thereafter of a specific sum to his daughter, who has knowledge of the gift, and that it is secured by mortgage, is a gift inter vivos, and cannot be revoked by the discharge of the mortgage by the father as fully paid and satisfied. (*Holmes v. McDonald*, 430.)

6. **GIFTS—CONFIDENTIAL RELATIONS—UNDUE INFLUENCE—BURDEN OF PROOF.**—If the donee is a half-sister of the donor, but they live in different places and she does not stand in

a confidential relation to him, although his favorite relative, the burden of proof is not upon her to explain why, during his last sickness, he made a gift to her instead of to his married daughter by a wife from whom he had been divorced. (*Richardson v. Smart*, 488.)

7. GIFTS—CAPACITY OF MAKER—DELIRIUM OF SICKNESS.—The fact that the donor had typhoid fever and on the day he made the gift, and for a few days preceding, manifested the intermittent delirium usually accompanying such disease, does not avoid the gift nor show that he did not have intelligence sufficient to know what he was doing at the time he made the gift. (*Richardson v. Smart*, 488.)

See Devise, 2; Husband and Wife, 14.

GUARANTY.

1. GUARANTY—CONSTRUCTION OF CONTRACT—EVIDENCE.—In an action upon a contract of guaranty, letters written by the plaintiff to his guarantor long after the contract was made, and containing self-serving declarations irrelevant to any issue in the case, are not admissible in evidence to aid in construing the contract where it is clear and unambiguous in its terms. (*Thilmany v. Iowa Paper Bag Co.*, 259.)

2. GUARANTY—CONSTRUCTION.—In cases of guaranty the language of the instrument is not to be construed most strongly against the party who uses it. (*Sherman v. Mulloy*, 286.)

3. GUARANTY—WHETHER A CONTINUING ONE.—A written instrument reciting that the signer agrees "to be holden for stock delivered to A to the amount of two hundred dollars (\$200), and agrees to pay the same," is not a continuing guaranty, but ceased to be binding as soon as A had been furnished goods to the amount of two hundred dollars and had received pay therefor. (*Sherman v. Mulloy*, 286.)

GUARDIAN AND WARD.

1. JUDGMENTS—COLLATERAL ATTACK—RESIDENCE OF MINOR.—Unless it appears on the face of the record that the minor, for whom the probate court has appointed a guardian, was not a resident of the county, the appointment cannot be attacked collaterally on the ground of the non-residence of such minor. (*Cox v. Boyce*, 483.)

2. JUDGMENTS—GUARDIAN'S SALE—COLLATERAL ATTACK.—If the probate court of the county in which a minor resides takes jurisdiction of his estate and appoints a guardian, and, after such minor's removal to another county, the probate court thereof takes jurisdiction of the minor and his estate, and orders his real property sold, such sale cannot be collaterally attacked on the ground of the exclusive jurisdiction of the first court, when nothing appears on the face of the record of the second court showing that the minor was a nonresident of that county or that the court acted without jurisdiction. (*Cox v. Boyce*, 483.)

HIGHWAYS.

1. HIGHWAYS—ESTABLISHMENT OF, BY PRESCRIPTION, OVER GOVERNMENT LAND.—The laws of the United States grant a right of way for the construction of highways over public lands, not reserved for public use, and, in the state of Washington, the establishment of highways by prescription is recognized. Hence, a highway in that state may be created by pre-

scription or limitation over land held under a pre-emption or homestead claim and prior to patent by the United States. (*Smith v. Mitchell*, 858.)

2. **ADVERSE POSSESSION.—TITLE TO PUBLIC HIGHWAYS** may be acquired by adverse possession. (*Moon v. Mills*, 890.)

3. **EQUITY—INJUNCTION—RIGHT TO JURY TRIAL.**—An action to restrain one from obstructing a public highway, in which no damages are alleged or sought, is equitable in its nature, and it is proper to deny the defendant's demand for a jury trial therein, though a jury may be impaneled as advisory merely. (*Smith v. Mitchell*, 858.)

See Nuisance, 1.

HOMESTEADS.

1. **HOMESTEADS—ABANDONED WIFE.**—A wife, upon being abandoned by her husband, succeeds to the homestead estate as the head of the family. (*Lynn v. Sentel*, 110.)

2. **HOMESTEADS—ABANDONMENT.**—After a homestead has once been acquired, a temporary absence therefrom, with an intention of returning, is not an abandonment. (*Lynn v. Sentel*, 110.)

See Judgment, 17; Marriage and Divorce, 6.

HOMICIDE.

HOMICIDE—WHAT MAY BE MURDER.—An accidental homicide may be murder if it occurs in the course of an attempt to commit a felony. (*Commonwealth v. Chance*, 306.)

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE—AGENCY—TITLE OF WIFE TO DEPOSITS IN BANK.**—Where a wife, acting as the agent of her husband, receives money from him, delivers it to a bank, and directs the bank to make a contract with the wife to deliver a like amount to her, and the bank, taking the money from her as the agent of her husband, and in compliance with the directions of such agent, delivers to the wife, acting in her individual capacity, the bank-book made out in her name, the bank has made a contract with the wife, and her title to the account is good. (*Brown v. Brown*, 292.)

2. **HUSBAND AND WIFE—LIABILITY OF HER SEPARATE ESTATE FOR HIS DEBT.**—If a wife, in good faith, forms a business partnership with a third person, her husband does not, by voluntarily and gratuitously devoting his services to his wife's business, acquire any interest in the firm property which may be subjected to the payment of his individual debts, although his labor and skill have contributed largely to the firm's accumulation of property. (*Deere v. Bonne*, 254.)

3. **HUSBAND AND WIFE.—THE LEGAL FICTION** of the oneness of husband and wife has not been entirely effaced by the statutes of Iowa. (*Heacock v. Heacock*, 273.)

4. **HUSBAND AND WIFE—HER RIGHT TO CONTRACT WITH HIM—CONSTRUCTION OF STATUTE.**—Statutes relating to the separate property of a married woman and her right to her real and personal property do not give her a right to personally contract with her husband. (*Heacock v. Heacock*, 273.)

5. **HUSBAND AND WIFE—DISABILITIES OF—HOW FAR REMOVED.**—All disabilities which the common law imposes upon

husband and wife by reason of the marriage status still exist in Iowa, except in so far as they have been modified or changed by express statutory enactment. (*Heacock v. Heacock*, 273.)

6. HUSBAND AND WIFE—CONTRACTS BETWEEN—VALIDITY OF.—A statute providing that "contracts may be made by a wife and liabilities incurred, and the same enforced by or against her to the same extent and in the same manner as if she were unmarried," has reference to contracts with persons other than her husband. His disabilities must also be removed before a contract between him and her would be valid. (*Heacock v. Heacock*, 273.)

7. HUSBAND AND WIFE—HER RIGHT TO CONTRACT WITH HIM—LIMITATION UPON.—Married women can contract with their husbands only in matters relating to their separate estates. (*Heacock v. Heacock*, 273.)

8. HUSBAND AND WIFE—WANT OF REMEDY PRECLUDES HER FROM SUING HIM ON HIS PERSONAL CONTRACT.—A wife who has no remedy against her husband, except for the infraction of some of her property rights, cannot sue him on his personal contract made with her. (*Heacock v. Heacock*, 273.)

9. HUSBAND AND WIFE—ACTION BY HER ON HIS CONTRACT—WHAT SHE MUST PLEAD AND PROVE.—In an action by a wife against her husband upon a contract made between them, she must plead and prove that the contract was with reference to her separate estate, for no particular consideration will be presumed, although the contract is in writing. (*Heacock v. Heacock*, 273.)

10. HUSBAND AND WIFE—ACTIONS BY HER AGAINST HIM—CONSTRUCTION OF STATUTES.—Statutes which authorize a wife to maintain an action to recover property belonging to her, the possession or control of which has been obtained by her husband, or which permit her to prosecute all actions "for the preservation and protection of her rights and property," or which authorize her, in general terms, to enforce contracts made by her as if unmarried, do not authorize her to sue her husband on his personal contract made with her. (*Heacock v. Heacock*, 273.)

11. HUSBAND AND WIFE—SHE CANNOT SUE HIM ON HIS PERSONAL CONTRACT.—Under the statutes of Iowa, a wife has no right of action against her husband, except for the preservation or protection of her separate property. She cannot sue him on his personal contract, such as a note made by him to her during coverture. (*Heacock v. Heacock*, 273.)

12. ALIENATION OF AFFECTIONS—ACTION BY WIFE FOR.—At common law, an action for the alienation of the affections alone cannot be maintained either by the husband or the wife. The alienation of the affections is merely a matter of aggravation of damages; and a complaint by a wife which charges no adultery, no procuring and enticing, or no harboring and secreting, does not state a cause of action. (*Houghton v. Rice*, 351.)

13. ALIENATION OF AFFECTIONS—GIST OF ACTION FOR ADULTERY.—An action to recover damages for adultery committed with the plaintiff's wife is based upon his loss of consortium, and the alienation of affections is not the gist of the action, but is merely a matter of aggravation. (*Evans v. O'Connor*, 316.)

14. HUSBAND AND WIFE—GIFT TO WIFE.—In Massachusetts a married woman cannot acquire property by a direct gift from her husband, but a valid and irrevocable gift may be made from the husband to the wife through a third party. (*Brown v. Brown*, 292.)

15. HUSBAND AND WIFE—NONSUPPORT OF FAMILY—DEFENSES.—A husband cannot justify nor excuse his abandonment

and nonsupport of his family on the ground that it is done in order to give his services to his father in expectation of succeeding to the latter's property. (*People v. Malsch*, 381.)

16. JUDICIAL SALES—PURCHASER WITH NOTICE.—If a judgment is obtained against a husband after he has abandoned his wife and obtained a divorce from her in a foreign jurisdiction, upon notice by publication, the purchaser of land sold under execution issued upon such judgment, or his assignee, is not an innocent purchaser without notice, as against the homestead rights of the wife, who is in exclusive possession of the premises. (*Lynn v. Sentel*, 110.)

See Homesteads, 1; Wills, 12-14.

HYPOTHETICAL QUESTIONS.

See Witnesses, 13.

ILLEGITIMATES.

See Descent, 1, 2.

IMPAIRING OBLIGATION OF CONTRACT.

See Interest, 11; Statutes, 10.

IMPROVEMENTS.

See Ejectment, 1, 2.

INDICTMENT.

INDICTMENT—DESCRIPTION OF INSTRUMENT—VARIANCE.—While it is not necessary to the validity of an indictment to set out figures in the margin which constitute no part of the contract of the instrument, yet if such figures are set out they constitute matters of description, and the original cannot be admitted in evidence if there is a variation in matter of description between the copy set out and the original offered. (*Haupt v. State*, 19.)

INFANTS.

See Domicile; Municipal Corporations, 13; Negligence, 2, 5, 6.

INJUNCTION.

1. INJUNCTION AGAINST MUNICIPAL CORPORATIONS.—Courts of equity have jurisdiction to restrain the proceedings of municipal corporations, where those proceedings encroach upon private rights, and are productive of irreparable injury. (*Bristol Door etc. Co. v. Bristol*, 783.)

2. INJUNCTION AGAINST NEWS ASSOCIATION.—An Injunction will issue to restrain the Associated Press, a news association, from refusing to furnish news to one of its members in accordance with the terms of a contract, where the only ground for refusal is the violation by the member of an illegal provision in the contract that he would not procure news from antagonistic agencies. (*Inter-Ocean Pub. Co. v. Associated Press*, 184.)

See Highways, 3; Nuisance, 1.

IN PARI DELICTO.

See Maxima.

INSANE PERSONS.

CONTRACTS—CAPACITY OF MAKER—SICKNESS—PRESUMPTION.—If the alleged incompetency of the maker of a contract arises from the temporary sickness, resulting in intermittent conditions of sanity and insanity, and there is no prior incapacity alleged or proved, the usual presumption that when a state of facts is once shown to exist they must be presumed to have continued to exist until the contrary is shown has no application, and the burden of proof is upon the person challenging the legality of the act complained of to show that at the time that the act was done there was such incompetency. (*Richardson v. Smart*, 488.)

See *Criminal Law*, 7-18; *Gifts*, 7; *Witnesses*, 9-12, 15.

INSOLVENCY.

See *Bankruptcy; Corporations*, 20-22.

INSTRUCTIONS.

1. **TRIAL—INSTRUCTIONS.**—A refusal to give proper instructions as to the duty of the jury in arriving at a verdict is not ground for reversal of the judgment, if the evidence clearly warrants the verdict, and the instructions given fully state proper rules for the guidance of the jury. (*Metropolitan etc. R. R. Co. v. Skola*, 120.)

2. **TRIAL—INSTRUCTIONS.**—It is not error to refuse to give an instruction the substance of which is covered by another instruction already given. (*State v. Kuhlman*, 438.)

3. **TRIAL—INSTRUCTIONS ALREADY GIVEN** or sufficiently covered by other instructions given are properly refused. (*State v. McClellan*, 558.)

4. **TRIAL—INSTRUCTIONS—CONDITION OF WITNESS.**—An instruction cannot single out any particular witness and direct the jury to consider his condition in particular at the time of the transactions concerning which he has testified. (*State v. McClellan*, 558.)

5. **TRIAL—INSTRUCTIONS—ERROR CANNOT BE PREDICATED** upon the giving of an instruction requested by the party complaining. (*State v. McClellan*, 558.)

6. **TRIAL—INSTRUCTIONS—IDENTITY OF MINERAL VEIN.**—An instruction concerning the identity of mineral veins, stating that if no evidence of a vein appear for any considerable distance the veins are not identical, the use of the word "considerable" is not objectionable as being indefinite or confusing. (*Butte etc. Min. Co. v. Societe Anonyme etc.*, 505.)

7. **TRIAL—INSTRUCTIONS IN CRIMINAL CASE.**—Inconsistent instructions on a material point in a criminal case are sufficient to work a reversal of a judgment of conviction. (*State v. Peel*, 529.)

8. **INSTRUCTION — CRIMINAL CASE — MALICE.**—The accused in a murder case is not prejudiced by a failure to instruct the jury that "malice means intent to kill or do grievous bodily harm; if there was such precedent intent the homicide is murder; if there is no precedent intent, there is no murder," where from the instructions actually given it appears that the whole jury were led to suppose that an actual intent to kill unlawfully was necessary to the offense of murder. (*Commonwealth v. Chance*, 306.)

9. **INSTRUCTIONS IN CRIMINAL CASES—CIRCUMSTANTIAL EVIDENCE—CONSIDERATION OF FACTS.**—A jury should not be instructed, in a criminal case depending upon circumstan-

tial evidence, to pass upon each fact separately, though absolutely essential to conviction. All the facts must be considered together in determining the main issue. (*State v. Cohen*, 213.)

10. INSTRUCTIONS—REASONABLE DOUBT.—IT IS ERROR, in an instruction, to define a "reasonable doubt" as one that the jury are able to give a reason for. (*State v. Cohen*, 213.)

11. INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—ERRONEOUS CHARGE.—IN A CRIMINAL CASE, where the evidence is wholly circumstantial, it is erroneous to instruct the jury that they are not required, to warrant a conviction, to be satisfied beyond a reasonable doubt of each link in the chain of evidence relied upon to establish the defendant's guilt, and that it is sufficient if, taking the testimony altogether, they are satisfied, beyond a reasonable doubt, of his guilt, because the jury might understand therefrom that they are authorized to convict though an essential fact is not proved beyond a reasonable doubt. (*State v. Cohen*, 213.)

See Appeal; Evidence, 3; New Trial, 1; Trial.

INSURANCE.

1. INSURANCE—INSTRUCTION TO AGENT—EVIDENCE.—Private instructions given by an insurance company to its agent, not communicated, and unknown, to the insured, are inadmissible in evidence in an action against the company for a breach of its contract of insurance. (*Sanford v. Orient Ins. Co.*, 358.)

2. INSURANCE—FIRE—LOCATION OF PROPERTY.—Under a fire insurance policy on a fire-engine, hose, and hose-cart, while located and contained in the fire-engine house and "not elsewhere," no recovery can be had for the loss of such property while it is being used in an attempt to extinguish a fire several hundred feet from the fire-engine house. (*L'Anse v. Fire Assn. of Philadelphia*, 410.)

3. INSURANCE—ORAL CONTRACT—STATUTE OF FRAUDS. A contract to insure is not within the statute of frauds, since it may be completely performed within a year upon the happening of a contingency. (*Sanford v. Orient Ins. Co.*, 358.)

4. INSURANCE—ORAL WAIVER OF CONDITIONS—POWER OF AGENT.—Where a contract of insurance provides that the agent may change the conditions expressed in the policy by writing thereon, such agent having the general powers of the company over such changes, the company is bound when the agent, having notice, agrees to the changed condition. But when the power of the agent over such changes is limited, so that no change by the agent can be effected unless done by a writing on the policy, the company is not bound by changed conditions, unless the change has been made in accordance with the terms prescribed in the contract. (*Lippman v. Aetna Ins. Co.*, 62.)

5. INSURANCE—ORAL WAIVER OF CONDITIONS—CONSTRUCTION OF POLICY.—Where an insurance policy provides that it shall be void if the insured procures other insurance on the same property, "unless otherwise provided by agreement indorsed hereon or added hereto," and another clause in the contract provides that no agent "shall have power to waive any provision or condition of this policy, except as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon, or attached hereto, nor shall any privilege

or permission affecting the insurance under the policy exist or be claimed by the insured unless so written or attached," a mere oral permission by the agent to the insured to take out additional insurance is not binding on the company. (*Lippman v. Aetna Ins. Co.*, 62.)

6. **INSURANCE—WAIVER OF PROOF OF LOSS.**—Where an insured sends notice of loss to an insurance company, and the company sends its adjuster to view the burned premises, after which, with the company's local agent, an agreement is made with the insured to leave the amount of the loss to another, on the basis of whose figures the company would settle, such agreement to settle constitutes a waiver of the proofs of loss required by the policy, since the adjuster was acting within the apparent scope of his authority. (*Wholley v. Western Assur. Co.*, 314.)

7. **INSURANCE—POWER OF COMPANY TO CONTRACT.**—An insurance company having power generally to "make insurance against loss by fire" may make a preliminary contract to insure property to be consummated by a subsequent execution and delivery of a policy, and the language in its charter describing the manner in which a policy should be executed does not restrain this general power. (*Sanford v. Orient Ins. Co.*, 358.)

8. **INSURANCE—AUTHORITY OF AGENT—EVIDENCE.**—The fact that an insurance agent did not submit his risks to the company for its approval before he wrote and delivered the policy is admissible in evidence to show the nature of the agent's authority. (*Sanford v. Orient Ins. Co.*, 358.)

9. **INSURANCE—POWER OF GENERAL AGENT.**—A person who for years has been held out as the general agent of an insurance company, with full power to negotiate contracts of insurance, is authorized to make a preliminary contract of insurance to be consummated by a subsequent filling up and delivery of a policy. (*Sanford v. Orient Ins. Co.*, 358.)

10. **INSURANCE—CONTRACT—EVIDENCE.—CONVERSATIONS** with an insurance agent at the time of the contract are admissible to show what the contract was, in an action for a breach of the contract. (*Sanford v. Orient Ins. Co.*, 358.)

11. **INSURANCE—INSURABLE INTEREST.—THE POSSESSION** of property claiming title under a deed is sufficient evidence of ownership to give a person an insurable interest in the property. (*Sanford v. Orient Ins. Co.*, 358.)

12. **LIFE INSURANCE—BENEFICIARY—RECOVERY OF PREMIUMS PAID.**—The beneficiary of a life insurance policy, who is not in privity with the insurance company, had paid none of the premiums, and was without knowledge of the existence of the policy, cannot recover the premiums which have been paid, even though the policy was void and never attached. (*Sullivan v. Metropolitan Ins. Co.*, 365.)

13. **INSURANCE—LIFE—CONTRACT OF, WHEN VOID AS AGAINST PUBLIC POLICY.**—An agreement between a building association and a member thereof, that the latter shall insure his life for the benefit of the association, is contrary to public policy, and invalid, where the association has no insurable interest in his life. (*Tate v. Commercial Building Assn.*, 770.)

14. **INSURANCE—LIFE—UNLAWFUL AGREEMENT—INSURABLE INTEREST—MEASURE OF RECOVERY.**—An unlawful agreement cannot defeat a lawful right. Hence, if a building association and three of its members agree that such members shall insure their lives for the benefit of the association, the latter

to pay the premiums, but the members, instead of keeping their agreement, take out the insurance for their own benefit, without the knowledge of the association, and then assign the policies to the insurance company as collateral security for a debt due to it by the association, and the insurance company, upon the death of one of such members, in whom the association had no insurable interest, pays the policy, by crediting the amount on such debt, an assignee of the rights of the insured is clothed with all of the latter's rights, and, though the variance from the agreement did not become known to the association until after the death of the insured, such assignee is entitled to recover of the association the amount of the policy, less premiums paid by it thereon, and also the amount contributed by him to enable the association, along with like contributions from other members, to pay the interest on its debt and the premiums on the policies so assigned to the insurance company. The agreement for insurance upon the life of a member in which the association has no insurable interest is contrary to public policy and invalid, but the member has a lawful right to take out insurance for his own benefit. (*Tate v. Commercial Building Assn.*, 770.)

15. **INSURANCE—LIFE.—A BUILDING ASSOCIATION HAS NO INSURABLE INTEREST** in the life of one of its members, who is not indebted to it. (*Tate v. Commercial Building Assn.*, 770.)

16. **INSURANCE—LIFE—WANT OF INSURABLE INTEREST—RETENTION OF PROCEEDS—PUBLIC POLICY.**—It is contrary to public interest and against public policy to allow anyone to retain the proceeds of a policy of insurance, though voluntarily paid by the insurance company, where the insurance was effected for his benefit upon the life of another, in which he had no insurable interest, whether the policy was issued upon the life of the insured directly for such beneficiary, or for the benefit of the insured and then assigned by him to the beneficiary, as this would encourage speculation upon the chances of human life, with a direct interest in its early termination. (*Tate v. Commercial Building Assn.*, 770.)

17. **IN MARINE INSURANCE :** policy may be issued to cover property in which the insured has not at the time any interest, and the policy will attach when the interest is acquired. (*Boston Ins. Co. v. Globe Ins. Co.*, 303.)

18. **MARINE INSURANCE — REINSURANCE—WAGERING POLICY.**—A contract of reinsurance of such marine risks as the reinsured has when the contract was entered into, or might have or take during the year that it was to run, is not void as a wager policy, but is a valid contract of insurance. (*Boston Ins. Co. v. Globe Ins. Co.*, 303.)

19. **CONFLICT OF LAWS—STOCKHOLDERS' LIABILITY.**—The liability evidenced by stock notes given by stockholders in a mutual insurance corporation, must be considered and enforced with respect to the laws in force when and where the contract is made. (*Crofoot v. Thatcher*, 725.)

INTEREST.

1. **INTEREST — ABATEMENT OF — WHEN NOT ALLOWABLE.**—After judgment has been obtained for a debt, both principal and interest, it is too late to raise the question of an abatement of interest. (*Rowe v. Hardy*, 811.)

2. **INTEREST ON JUDGMENTS.**—If the statute provides that a judgment shall bear the same rate of interest as the contract bore, the rate upon the judgment is, nevertheless, the one fixed by statute, and it does not become the judgment rate by agreement of the parties. (*Wyoming Nat. Bank v. Brown*, 935.)

3. INTEREST ON JUDGMENTS.—If the creditor, upon the breach of the contract, elects to merge it in a judgment, interest as agreed upon by the parties ceases, and the judgment bears such interest as is prescribed by law. (*Wyoming Nat. Bank v. Brown*, 935.)

4. INTEREST ON JUDGMENTS—CHANGE OF RATE BY STATUTE.—A statute reducing the rate of interest which judgments shall bear, passed after the rendition of the judgment, is a conclusive determination by the legislature that the damages accruing to the judgment creditor by being deprived of the use of the amount due are measured by a lower rate of interest during the period subsequent to the taking effect of the statute than from the rendition of the judgment up to that time, and no rights of the creditor, who is, for the period after the passage of the statute, required to accept a reduced rate of interest upon his judgment, are destroyed or interfered with by such legislation. (*Wyoming Nat. Bank v. Brown*, 935.)

5. INTEREST—RATE RECOVERABLE.—If there is either an express or implied contract to pay interest until the principal sum shall be paid, interest at the agreed rate, or, in the absence of an agreed rate, at the rate prescribed by law at the date of the contract, is the rate recoverable until payment of the principal, or until the contract is merged in a judgment. (*Wyoming Nat. Bank v. Brown*, 935.)

6. INTEREST ON JUDGMENTS.—Judgments do not bear interest under the common law, and the judgment creditor may, if left to his common-law remedy, recover such damages as he can prove have accrued to him by being deprived of the use of his money, or, if regulated by statute, such sum or rate as the statute has fixed as the value of the use of the money during the time he has been unreasonably deprived of the use of it. (*Wyoming Nat. Bank v. Brown*, 935.)

7. INTEREST UPON JUDGMENTS allowed by statute is not interest in the strict sense, but a fixed measure of damages for delay in payment. (*Wyoming Nat. Bank v. Brown*, 935.)

8. INTEREST ON JUDGMENTS—CHANGE IN RATE.—A judgment is not a contract of which the rate of interest fixed by statute at the time it is rendered is a part, and the rate of interest on a judgment may be changed or modified by statute. (*Wyoming Nat. Bank v. Brown*, 935.)

9. INTEREST—EFFECT OF CHANGE IN RATE BY JUDGMENT.—A change in the rate of interest upon the merger of the contract in a judgment does not impair nor encroach on the right of either party to the contract. (*Wyoming Nat. Bank v. Brown*, 935.)

10. INTEREST—CHANGE IN LAW.—CONTRACTS which stipulate for interest will draw interest until payment at the rate agreed therein, or, in the absence of an agreed rate, at the rate prescribed by law when the contract was executed, and a change of the legal rate would not affect the rate recoverable. (*Seton v. Hoyt*, 641.)

11. STATUTES—IMPAIRING OBLIGATION OF CONTRACTS—INTEREST ON COUNTY WARRANTS.—The obligation of a county to pay interest on its warrants, which arises from nonpayment when they are presented, and an indorsement thereon, "Not paid for want of funds," is, as an implied contract, under the protection of that provision of the constitution which prohibits the passage of any law impairing the obligation of contracts. (*Seton v. Hoyt*, 641.)

12. COUNTIES—LIABILITY OF, FOR INTEREST.—A sovereign state is not required to pay interest, except when self-im-

posed. Hence, a county, which is but an arm or agent of the state, is not liable for interest, under a general law regulating the subject of interest, where it is not expressly named therein as being so liable. (*Seton v. Hoyt*, 641.)

13. COUNTIES—INTEREST ON WARRANTS—INDORSEMENT, "NOT PAID FOR WANT OF FUNDS"—EFFECT OF.—If county warrants are presented for payment when there is no money available for that purpose, and the law provides that the treasurer, in such event, shall indorse thereon, "Not paid for want of funds," after which the warrants are to draw legal interest, such nonpayment and indorsement amount to a contract, on the part of the county, to pay the legal rate of interest. (*Seton v. Hoyt*, 641.)

14. COUNTIES—INTEREST ON WARRANTS—CHANGE IN RATE.—County warrants indorsed, "Not paid for want of funds," bear interest at the legal rate which existed at the date of the indorsement, and this rate cannot afterward be reduced by the legislature. (*Seton v. Hoyt*, 641.)

See Mortgages, 5.

INTERSTATE COMMERCE.

See Taxes, 11.

INTOXICATING LIQUORS.

See Municipal Corporations, 18; Negligence, 11.

IRRESISTIBLE IMPULSE.

See Criminal Law, 7, 11-13.

JUDGMENTS.

1. JUDGMENT—ACTION ON—SATISFACTION BY LEVY.—In an action to recover a balance due on a judgment, evidence as to the value of goods previously levied upon is properly excluded, since the mere levy of an execution on personal property of sufficient value to satisfy the same does not operate as a satisfaction of the judgment. (*Smith v. Condon*, 372.)

2. JUDGMENTS—CONCLUSIVENESS.—A judgment rendered in a court of competent jurisdiction is conclusive between the parties and privies in regard to all matters in controversy determined by the judgment, and all persons represented by the parties, both plaintiff and defendant, are bound and concluded as privies by the judgment rendered. (*Singer v. Hutchinson*, 133.)

3. JUDGMENT—ENTRY OF FINAL—WHAT IS NOT.—If the only thing appearing in the record on appeal respecting the judgment below is an entry showing an overruling of a motion for a new trial, judgment on the verdict for a certain amount, and the allowance of an appeal, such appeal must be dismissed on motion for want of a final judgment. (*Metzger v. Wooldridge*, 100.)

4. JUDGMENT—CONFESSION OF, BY BUILDING ASSOCIATION, FOR ANTECEDENT DEBT—EFFECT OF.—Under section 1149 of the code of Virginia, any lien or encumbrance created by the voluntary act of a company chartered by a court, for the purpose of giving a preference to one creditor over another creditor, except to secure a debt contracted or money borrowed at the time, inures to the benefit ratably of all its creditors. Hence, if a building association confesses a judgment for an antecedent debt,

the lien thus voluntarily and actively created on its property will inure ratably to the benefit of all its existing creditors. (*Tate v. Commercial Building Assn.*, 770.)

5. JUDGMENT LIEN UPON LAND, THE DEED TO WHICH IS UNRECORDED.—IF PARTIES EXCHANGE LANDS, but the grantee of one tract fails to record his deed, a judgment against his grantor, docketed between the time of delivering the deed and the date of its recordation by the grantee, is a lien upon the land given in exchange, as well as upon that received in exchange. The rights of the parties are not affected by the character of the consideration given for the deed. (*Price v. Wall*, 788.)

6. JUDGMENTS—COLLATERAL ATTACK.—If the court had jurisdiction of the subject matter, and it appears on the face of the record that the proper parties were before it and that it proceeded within its lawful bounds, the judgment can be attacked only directly and not collaterally. This rule applies to the judgments of probate courts. (*Cox v. Boyce*, 483.)

7. JUDGMENTS—COLLATERAL ATTACK.—If the subject matter of adjudication is of a kind over which the court has no jurisdiction, its judgment is a nullity, and may be treated as such even in a collateral attack. (*Cox v. Boyce*, 483.)

8. JUDGMENT — COLLATERAL ATTACK — NONAPPEARANCE OF ORIGINAL SUMMONS IN JUDGMENT-ROLL.—If the proof of publication of summons, as well as the findings and recitals in the judgment, show that a summons was issued, the judgment will not be held void, upon collateral attack, because the original summons does not appear in the judgment-roll. (*Bank of Colfax v. Richardson*, 664.)

9. JUDGMENT—COLLATERAL ATTACK—PROOF OF SERVICE OF SUMMONS.—A judgment is not invalid, on collateral attack, simply because the proof of service of the summons is not annexed to, or indorsed on, the summons itself. (*Bank of Colfax v. Richardson*, 664.)

10. JUDGMENT—COLLATERAL ATTACK—WANT OF JURISDICTION.—Errors or irregularities in the record of a superior court cannot be collaterally attacked unless they show a want of jurisdiction. (*Bank of Colfax v. Richardson*, 664.)

11. JUDGMENT AGAINST NONRESIDENT—COLLATERAL ATTACK—DEFECTIVE ATTACHMENT.—In an action against a nonresident, the judgment of a superior court against him cannot be collaterally attacked for any defect in the attachment proceedings therein, where the statute does not make such proceedings jurisdictional, unless the record affirmatively shows a want of jurisdiction. (*Bank of Colfax v. Richardson*, 664.)

12. JUDGMENT AGAINST NONRESIDENT—COLLATERAL ATTACK—ISSUANCE OF SUMMONS.—The judgment in a proceeding by attachment against a nonresident cannot be collaterally attacked on the ground that the record does not affirmatively show that a summons was issued in the action at or before the issuance of the writ of attachment. (*Bank of Colfax v. Richardson*, 664.)

13. JUDGMENT—VACATING FOR FRAUD—FAILURE TO DISCLOSE EVIDENCE.—The fact that a prevailing party defendant failed to voluntarily disclose the weakness of his defense, or some evidence which would tend to overthrow his defense, does not authorize the vacating of the judgment on the ground of fraud. (*McDougall v. Walling*, 849.)

14. JUDGMENT — VACATING FOR FRAUD — PERJURY — NECESSITY OF ADDITIONAL CIRCUMSTANCES.—If an action

is brought against a principal and his surety, and the latter successfully evades liability on the ground that his principal had been given an extension of time without the surety's consent, perjury committed in such action, by the surety, in testifying that he had not received any consideration from the principal for becoming surety, when in fact he had received a consideration, is not such fraud practiced by the prevailing party as will authorize the vacating of the judgment, where there were no circumstances coupled with the perjury which would relieve the opposite party from all implication of want of diligence, and completely deceive him in the nature of the testimony. (*McDougall v. Walling*, 849.)

15. JUDGMENT—VACATING FOR FRAUD—PERJURY.—Under a statute authorizing a judgment to be vacated for fraud, but which does not specify perjury as a distinctive ground for vacating a judgment, perjury by the prevailing party to an action, discovered after the trial, is not such fraud as will justify the vacation of a judgment in his favor, where the judgment did not rest upon the alleged false testimony alone but was supported by other evidence. (*McDougall v. Walling*, 849.)

16. RES JUDICATA — BASTARDY PROCEEDINGS.—The discharge of a man by a police court, after a hearing on a complaint for bastardy is not a bar to a subsequent complaint against him in the same court for the same offense. (*Barnes v. Ryan*, 288.)

17. RES JUDICATA—ESTOPPEL TO ASSERT CLAIM OF HOMESTEAD AGAINST PURCHASER.—Where after the foreclosure of a mortgage and upon the levy of a mortgage fieri facias the defendant files a claim that the land has been set apart to him as a homestead, and a verdict against such claim is rendered and the property adjudged subject to execution, the defendant is concluded by such judgment from asserting any further homestead claim, and a purchaser of the land at sheriff's sale acquires a good title as against any homestead rights of the defendant. (*Cosnahan v. Johnston*, 86.)

18. JUDGMENTS—STARE DECISIS.—A judgment of the supreme court construing a statute renders it the law for the time being as so construed. Parties have a right to act upon such a decision, and no injury ought to be allowed to result by reason of a dependence thereon as to pending proceedings, if the decision is subsequently changed, any more than in the case of a repeal of a statute. (*Kelley v. Rhoads*, 904.)

See Appeal, 10-12, 21; Corporations, 12; Guardian and Ward, 1, 2; Interest, 2-9; Mortgages, 3, 10; Receivers, 1; Suretyship, 2-4; Trover.

JUDICIAL SALES.

See Executions, 3-5; Mortgages, 2.

JURISDICTION.

1. JURISDICTION—COURTS OF GENERAL JURISDICTION.—In the exercise of special statutory powers, a court of general jurisdiction is regarded as a court of limited and special jurisdiction, and its jurisdiction must appear from the record itself. (*Watts v. Dull*, 141.)

2. ACTIONS AGAINST NONRESIDENTS—PREREQUISITE TO JURISDICTION.—In an action against a nonresident on a money demand, a seizure of the defendant's property by attachment is not a statutory prerequisite to jurisdiction, but is wholly a judicial requirement. (*Bank of Colfax v. Richardson*, 964.)

3. ACTIONS AGAINST NONRESIDENTS—WHAT GIVES JURISDICTION.—In an action on a money demand against a non-resident, where he does not appear and has not been served with process within the territorial limits of the court, the authority of the court to hear and proceed to judgment depends upon the service of process by publication and the actual attachment of property to be concluded by the judgment, and not upon the regularity of the attachment proceedings. (*Bank of Colfax v. Richardson*, 664.)

See Attachment, 3; Judgment, 10.

JURORS.

See Trial.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—ACTION FOR RENT—BAR.—Where a lease provides for the payment of rent in separate installments, separate actions may be brought on the lease for each installment, and a judgment for one installment of rent is no bar to a second action to recover for a subsequent installment. (*Marshall v. Grosse Clothing Co.*, 181.)

2. LANDLORD AND TENANT—EVICTION AS A DEFENSE—RES JUDICATA.—An alleged eviction cannot be set up as a defense in a second suit for the recovery of rent, where the acts constituting the eviction were known to the tenant before the trial of the first suit, and could have been raised and determined under the issues in that suit. (*Marshall v. Grosse Clothing Co.*, 181.)

3. LANDLORD AND TENANT—WHAT NOT AN EVICTION.—Where a tenant abandons premises without the fault of the landlord, the landlord may re-enter and re-rent the premises, and his so taking possession is not an eviction and does not relieve the tenant from the liability for rent. (*Marshall v. Grosse Clothing Co.*, 181.)

4. LANDLORD AND TENANT—BUILDINGS—RIGHT TO REMOVE.—If there is a contract between the landlord and tenant that the tenant may erect buildings at his own expense with the privilege of moving them at any time during his lease, they do not, as between the landlord and tenant, become part of the land, and may be moved off the leased premises by the tenant during the continuance of the lease, as they continue to be personal chattels and the property of the person who causes them to be built. (*Union Central Life Ins. Co. v. Tillery*, 480.)

5. LANDLORD AND TENANT—BUILDINGS—RIGHT OF PURCHASER UNDER FORECLOSURE.—If a tenant erects buildings on the leased land under agreement with his landlord that he may remove them on the termination of the lease, and such agreement is not recorded, such buildings pass with the land to a purchaser thereof at foreclosure sale without notice of such agreement and the tenant is not entitled to remove them. (*Union Central Life Ins. Co. v. Tillery*, 480.)

6. LANDLORD AND TENANT—BUILDINGS—RIGHT OF PURCHASER TO.—If leased land is sold to a purchaser without notice that the lessee has erected buildings thereon and reserved the right to remove them during the term of his lease, such buildings pass with the land to such purchaser. (*Union Central Life Ins. Co. v. Tillery*, 480.)

7. LANDLORD AND TENANT—NOTICE OF OPTION TO TERMINATE LEASE.—Under a lease which provided that "should

any payment fail to be made at or within thirty days after its maturity, the lease may be terminated at the option of the party of the first part," a demand for the possession of the premises, after a demand for payment of rent due for more than a month, constitutes a sufficient notice that the lessor was exercising his option to terminate the lease, although the demand for back rent is coupled with a demand for rent for the succeeding month. (*McCroskey v. Hamilton*, 79.)

8. **LANDLORD AND TENANT—OIL LEASES—RIGHTS OF TENANT—VESTED RIGHTS—EQUITY JURISDICTION.**—Lessees in an oil lease who have bound themselves by covenants to develop a tract, and have entered and produced oil, have a vested estate in the land which cannot be taken away on any mere difference of judgment, and the jurisdiction of equity to decree any specific act against the lessee or to declare a forfeiture depends on fraud averred and fully proved. (*Coglan v. Forest Oil Co.*, 695.)

9. **LANDLORD AND TENANT—OIL LEASES.**—There is no special relation of trust or confidence between the lessor and lessee in gas or oil leases any more than in any other. Like all other contracting parties, they deal at arm's length, each for his own interest, and so long as the question is one of business judgment, and management, the lessee is not bound to work unprofitably for himself for the profit of the lessor, and the parties must be left to their own ways. It is only when a manifestly fraudulent use of opportunities and control is shown that courts are authorized to interfere. (*Coglan v. Forest Oil Co.*, 695.)

10. **LANDLORD AND TENANT—OIL LEASES—RIGHTS OF LESSEE.**—If a lessee of oil or gas lands derives some collateral or incidental advantage from his leases of adjoining land, he is entitled to it just as a stranger would be. He may operate them jointly at less expense, or he may be helped in other ways by having both under one management. It is only when the wells on adjoining territory are being fraudulently used to drain the complainant's land that courts have any occasion to interfere. (*Coglan v. Forest Oil Co.*, 695.)

11. **LANDLORD AND TENANT—SURRENDER—RIGHT TO GROWING CROP.**—A tenant after surrender of the leased premises has no right to the crop growing thereon, cannot maintain an action therefor, and can transfer no right therein to another. (*Smith v. Sprague*, 884.)

See *Estoppel*, 2; *Mechanics' Liens*, 2, 3; *Specific Performance*.

LEASES.

See *Landlord and Tenant*; *Mechanics' Liens*, 2, 3; *Mines*, 12; *Specific Performance*.

LEGISLATURE.

See *Police Power*, 1, 2.

LIENS.

See *Creditor's Bill*; *Judgments*, 5; *Vendor and Purchaser*, 3-5.

LIMITATION OF ACTIONS.

1. **LIMITATION OF ACTIONS—CONFLICT OF LAWS—LEX FORI—LEX LOCI CONTRACTUS.**—The *lex fori* controls as to the time within which a cause of action shall be enforced, but the *lex*

loci contractus controls in determining when the cause of action upon a contract arises, so as to put the statute of limitations in operation. (*Crofoot v. Thatcher*, 725.)

2. LIMITATIONS OF ACTIONS—KNOWLEDGE OF FRAUD. The law does not contemplate actual knowledge of a fraud before the statute of limitations begins to run, but such knowledge or notice as would lead a man of reasonable prudence to make inquiries which would disclose the fraud. (*Clark v. Van Loon*, 219.)

3. LIMITATIONS OF ACTIONS—KNOWLEDGE OF FRAUD—RECORD OF DEED.—If the facts which a record of a deed shows, with other facts known, are of a character to suggest fraud, persons interested must be charged with the knowledge which inquiry made with reasonable diligence would disclose. (*Clark v. Van Loon*, 219.)

4. LIMITATIONS OF ACTIONS—RECOVERING VALUE OF LAND FRAUDULENTLY CONVEYED—DEED OF RECORD.—Under a statute which declares that an action for relief on the ground of fraud must be brought within five years after the cause of action accrues, an action to recover the value of land, at one time held by the defendant as security for the payment of money but which he fraudulently conveyed, is barred by the statute of limitations after the expiration of five years from the time that the deed was put upon record, although the plaintiff is a non-resident of the state and did not have actual notice of the fraud. (*Clark v. Van Loon*, 219.)

See Corporations, 6, 13, 14; Executors and Administrators, 1.

MALICE.

See Instructions.

MARRIAGE AND DIVORCE.

1. MARRIAGE IN FACT MAY BE SHOWN by proof of an agreement between two persons of opposite sex to take each other presently as husband and wife, consummated by cohabitation. (*People v. Mendenhall*, 408.)

2. MARRIAGE AND DIVORCE—PLEADING.—A libellant in a divorce case may join two or more distinct causes for divorce in the same bill. Thus, cruelty and adultery may be set up in the same libel for divorce. (*Braun v. Braun*, 699.)

3. MARRIAGE AND DIVORCE—CRUELTY.—A divorce may be granted a wife upon evidence showing that the husband in his conduct toward her has been guilty of vile indecency, obscenity, dreadful profanity, coarse and brutal vulgarity, and that he added to this charges against the virtue of such wife, denying the paternity of his children, accusing her of adultery, compelling her to take dangerous drugs, and urging her to consent to a criminal operation to produce an abortion, and spreading his accusations broadcast without apparent cause, except an insane and unfounded jealousy. (*Braun v. Braun*, 699.)

4. DIVORCE—CRUELTY—CONDONATION.—A wife is not entitled to a divorce on the ground of her husband's cruelty, where she made no complaint of his acts at the time and was largely to blame therefor herself; where she apologized for her own acts; where she continued to live with him long after such acts of cruelty were committed; and where there is no future danger to be apprehended as to her life or health. Such conduct clearly amounts to a condonation. (*May v. May*, 202.)

5. **DIVORCE—ADULTERY—CONNIVANCE.**—A husband who employs a spy to have sexual intercourse with his wife is not entitled to a divorce on the ground of her adultery, where such intercourse takes place. (*May v. May*, 202.)

6. **DIVORCE — FOREIGN — EFFECT ON WIFE'S HOME-STEAD.**—If a husband abandons his wife and removes to a foreign jurisdiction, and there obtains a divorce upon constructive notice, the decree is not conclusive against his wife so as to bar a home-
stead or other property right or estate acquired by her prior to the date of the decree. (*Lynn v. Sentel*, 110.)

7. **DIVORCE. FOREIGN—EFFECT ON DOWER RIGHTS.**—A statute providing for the forfeiture of the dower rights of a wife if a divorce is granted her husband for her fault does not apply when the divorce is granted in a foreign jurisdiction upon notice by publication, and for a cause not recognized as ground for divorce by the statute of her domicile. (*Lynn v. Sentel*, 110.)

See Bigamy; Dower, 2; Wills, 12-14.

MASTER AND SERVANT.

1. **MASTER AND SERVANT — FELLOW-SERVANTS—WHO ARE—NONLIABILITY OF MASTER.**—A master, having men employed in blasting rock, in a stone quarry, is not answerable for the act of the superintendent in directing one of the men to load a hole drilled in the rock, after giant powder has been exploded therein to dry it, even where he was empowered to hire and discharge employes and was negligent in giving such direction without waiting a sufficient time for the hole to cool, which resulted in an explosion, and an injury to the man loading the hole, for he was simply a fellow-servant, not then engaged in the discharge of any duty which the master owed to the injured employé. (*Mast v. Kern*, 580.)

2. **MASTER AND SERVANT—INJURY BY ONE EMPLOYÉ TO ANOTHER—MASTER'S LIABILITY.**—If an injury is caused to a servant by another employé, and the act causing the injury was one pertaining to the duty which the master owed to his servant, the master is answerable for the manner of its performance, without regard to the rank of the servant or employé to whom it was intrusted; but, if it was one pertaining only to the duty of an operative, the employé performing it, whatever his rank, was simply a fellow-servant with his collaborators, for whose negligence the master is not answerable. (*Mast v. Kern*, 580.)

3. **MASTER AND SERVANT—INJURY BY ONE EMPLOYÉ TO ANOTHER.**—A MASTER'S LIABILITY for an injury to a servant, caused by the negligence of another employé, depends upon the character of the act causing the injury, and not upon the grade or rank of the negligent employé. (*Mast v. Kern*, 580.)

4. **MASTER AND SERVANT—VICE-PRINCIPAL—FELLOW-SERVANTS.**—If a railway foreman, in his capacity of vice-principal, determines to run cars on a repair track after ordering a car repairer to work under a car already on such track, and negligently fails to warn such car repairer of his determination and of the resulting danger, his act is that of the master, and the fact that the foreman acts as motorman in running the cars upon the repair track does not relieve the master from liability. In such case, the foreman and the car repairer are not fellow-servants. (*Metropolitan etc. R. R. Co. v. Skola*, 120.)

5. **MASTER AND SERVANT — WARNING OF DANGER—DANGEROUS MACHINERY.**—A servant of mature years, who is employed in a mill in connection with machinery which is in per-

fect working condition, and the dangers of which can be ascertained by inspection, is not entitled to be warned of the danger incident to the operation of such machinery, notwithstanding she could not speak English and had no other knowledge of machinery than what she had gained in the few days in the mill. (*Robinska v. Mills*, 364.)

MAXIMS.

THE MAXIM, IN PARI DELICTO, IS NOT INFLEXIBLY APPLIED to an agreement which is not intrinsically immoral or evil, where no fraud or deception upon anyone is designed by it, and where it is condemned by the law because contrary to the interests of society; but the court will consider whether public policy will be promoted and like agreements be discouraged by enforcing or avoiding the agreement. If the policy of the law will be advanced by granting relief, it will be given. (*Tate v. Commercial Building Assn.*, 770.)

MECHANICS' LIENS.

1. MECHANIC'S LIEN—REPEAL OF STATUTE.—Section 1671 of Hill's General Statutes of the state of Washington, which provides that the owner of land may prevent a lien for labor performed or material furnished from attaching to it, for any improvement thereon for which he has not himself contracted, by giving notice that he will not be responsible therefor, is in conflict with section 2 of the act of 1893 (*Laws of 1893*, chapter 24, page 32), providing that if the builder owns less than a fee simple in the land to be affected by such a lien then only his interest therein is subject to the lien. The former act is, therefore, repealed by the latter one, which creates and provides for the enforcement of liens for labor and materials, which seems to be complete in itself, and which contains a repealing clause to the effect that all acts, or parts of acts, in conflict with its provisions are thereby repealed. (*Stetson-Post Mill Co. v. Brown*, 862.)

2. MECHANIC'S LIEN—DOES NOT ATTACH TO FEE, WHEN—LEASEHOLD INTEREST.—Under a statute which gives to every person performing labor upon, or furnishing material to be used in, the construction of buildings, a lien on such buildings, whether performed or furnished at the instance of the owner of the property or his agent, and which makes any person having charge of the construction, alteration, or repair of any property subject to such lien, the agent of the owner for the purpose of establishing the lien, the fee cannot be subjected to a mechanic's lien incurred by a lessee, where the latter has been accorded the privilege of erecting a building on leased land, which building shall become the property of the lessor upon the termination of the tenancy, if such privilege is entirely optional with the lessee, and no enforceable contract respecting a building exists between the lessor and lessee. (*Stetson-Post Mill Co. v. Brown*, 862.)

3. MECHANIC'S LIEN—LEASEHOLD INTEREST.—If a lessee, acting for himself and not for the owner, causes a building to be erected on the leased premises, it is the leasehold interest only which is subject to a lien for material furnished or labor performed. Where the builder owns less than a fee simple in the land, then only his interest therein is subject to the lien. (*Stetson-Post Mill Co. v. Brown*, 862.)

4. MECHANIC'S LIEN—MORTGAGE—PRIORITY.—If a lessee of premises who has, under the terms of his lease, the privilege of erecting a building thereon if he sees fit to do so, mortgages his leasehold interest, together with any building which he may sub-

sequently erect on the premises, to secure the payment of money, which is used toward paying the cost of a building which he does erect, the lien of the mortgage is prior and superior to a subsequent lien for materials furnished and labor performed on the building. (*Stetson-Post Mill Co. v. Brown*, 862.)

5. **MECHANIC'S LIEN—CLAIM FOR—WHEN UNAVAILING—CONFUSION OF ITEMS.**—A claim of mechanic's lien for lienable items is unavailing, where it is impossible to segregate such items from nonlienable items set forth in the account in such claim. (*Hughes v. Lansing*, 574.)

6. **MECHANIC'S LIEN—WAIVER OF.**—The right to a mechanic's lien may be waived by neglecting to perfect it, and to bring suit thereon within the time prescribed, or by express agreement. (*Hughes v. Lansing*, 574.)

7. **MECHANIC'S LIEN — WAIVER — CONSIDERATION TO SUPPORT—UNILATERAL CONTRACT.**—If the owner of a building, relying upon the waiver, by a materialman, of his right to a mechanic's lien, makes a payment to his contractor, which for the present he has a good right to withhold, and the contractor makes a like payment in amount to the materialman, the fact that the materialman secures the benefit of such payment is sufficient consideration to support his waiver, although the consideration was not named in the instrument, where it was well understood that no money would be paid to the contractor at that time, unless the waiver was produced; and the contract, having a consideration, cannot be characterized as a unilateral contract. (*Hughes v. Lansing*, 574.)

8. **MECHANIC'S LIEN — WAIVER OF — PLEADING.**—It is proper to plead a waiver of a mechanic's lien, as such, instead of setting up the matters and things which gave rise to it by way of estoppel. (*Hughes v. Lansing*, 574.)

9. **MECHANIC'S LIEN—WAIVER BY AGENT—STATUTE OF FRAUDS.**—The right to preserve and perpetuate a mechanic's lien upon buildings is not an interest in land. Hence, a written waiver of a mechanic's lien by an agent, though executed without the formalities required touching instruments affecting land, is a bar to the enforcement of the lien thus waived. (*Hughes v. Lansing*, 574.)

10. **MECHANIC'S LIEN—POWER OF AGENT TO WAIVE.**—An agent having authority to represent his principal in the manufacture and sale of lumber, and to file mechanics' liens, is empowered, without any written authority, to waive a mechanic's lien for lumber sold by him for his principal. (*Hughes v. Lansing*, 574.)

11. **MECHANIC'S LIEN.—A WAIVER OF ALL CLAIMS FOR MATERIALS FURNISHED** to contractors, and used in the owner's buildings, is equivalent to a waiver of the right to claim a lien therefor against the buildings. (*Hughes v. Lansing*, 574.)

12. **MECHANIC'S LIEN—PRIVILEGE.**—The right of a party to assert and perfect a mechanic's lien is a statutory privilege which he may exercise or not, at his pleasure. (*Hughes v. Lansing*, 574.)

MINES AND MINING.

1. **MINES AND MINING—CITIZENSHIP.**—While it is true, as a general rule, that only citizens of the United States can locate mining claims therein, yet the question of citizenship can be asserted only by the government, and it does not arise and cannot be considered in a contest between individuals in an action of ejectment. (*Wilson v. Triumph etc. Co.*, 718.)

2. MINES AND MINING—LOCATION BY ALIEN—TRANSFER TO CITIZEN.—If a mining claim is located by an alien on unappropriated government land, and he and his representatives, claiming to be the owners thereof perform all the acts and work necessary to keep the claim good until it is conveyed by them to a citizen, such conveyance vests the title in such citizen as between him and another citizen who takes subsequent possession of the claim, provided no rights of third persons have attached prior to such conveyance. (*Wilson v. Triumph etc. Co.*, 718.)

3. MINES AND MINING—LOCATION BY ALIEN—RELOCATION.—A qualified locator may relocate a mining claim in the possession of an alien who has not declared his intention of becoming a citizen, provided such relocation is made without force and violence, and prior to such declaration. As against a mere intruder or trespasser the possession of the alien is *prima facie* evidence of a right thereto, but as against a person connecting himself with the government title, this mere occupancy must yield to the higher right. (*Wilson v. Triumph etc. Co.*, 718.)

4. MINES AND MINING—WORK ON ONE CLAIM FOR BENEFIT OF SEVERAL.—If the evidence tends to show the consolidation of a group of mining claims for development and working purposes, and that the required amount of work was done on one claim for all, where they belong to one owner, the question of whether such work inures to the benefit of all of the property is properly left to the jury to determine. (*Wilson v. Triumph etc. Co.*, 718.)

5. MINES AND MINING—SUFFICIENCY OF NOTICE OF LOCATION.—If notice of the location of a mining claim is recorded, it must contain the name or names of the locators, the date of the location, and such a description of the claim located, by reference to some natural object or permanent monument, as will identify the claim. A reference therein to a known mining claim with date of its location, or to recorded claims adjoining it, with a hoisting shaft, is a sufficient compliance with the law requiring reference to be made to some natural object or permanent monument. (*Wilson v. Triumph etc. Co.*, 718.)

6. MINES AND MINING—CONTINUITY OF VEIN.—By "continuity" of a mineral vein is meant such mineral or geological connection as would enable a person to follow the vein along its dip, and through the obstructions, interruptions, and breaks which may occur therein, with reasonable certainty that it is the same and identical vein throughout its depth, from the apex to the point of controversy. Such continuity is all that is required to enable the locator to identify and follow the vein as his. (*Butte etc. Min. Co. v. Societe Anonyme etc.*, 505.)

7. MINES AND MINING—IDENTITY OF VEIN.—Identity is necessary to enable the owner of a mining claim to establish his right to mineral outside the perpendicular of the side lines of his surface claim as a part of the vein, the apex of which is within such side lines, and the vein must be continuous in a sense, but its continuity may be interrupted even to a closure of the fissure, without destroying the identity, provided the extent of the interruption or closure does not prevent the tracing of the lode or vein through the fissure to be identical in its parts as a geological fact. (*Butte etc. Min. Co. v. Societe Anonyme etc.*, 505.)

8. MINES AND MINING—IDENTITY OF VEIN.—If mineral veins are permanently separated and cannot be followed as the same vein, and, in order to connect them, it is necessary to pass through a considerable distance of rock showing no elements of a

vein, where there are neither minerals, walls, or seams, they must be deemed separate and distinct veins, and cannot be identified as one and the same vein. (*Butte etc. Min. Co. v. Societe Anonyme etc.*, 505.)

9. MINES AND MINING—RIGHT TO PURSUE VEIN.—The right of an apex proprietor to pursue an ore vein passing on its dip from his side lines is dependent upon whether or not, as a fact, the part or mineral body of vein matter which lies outside of the perpendicular of the side lines of his surface claim is so preserved in its identity with the lode inside that it is part of the same vein the apex of which is within his side lines. (*Butte etc. Min. Co. v. Societe Anonyme etc.*, 505.)

10. MINES AND MINING—RIGHT TO PURSUE VEIN.—A miner who has the apex in his location is entitled to the ore vein, and he has as much length thereof on the strike, no matter how deep he may go in the dip, as he has length of apex within his surface lines, whether such apex reaches the surface or is found beneath, within the planes of his exterior boundary lines extending downward perpendicularly. (*Butte etc. Min. Co. v. Societe Anonyme etc.*, 505.)

11. MINES AND MINING—TITLE TO JUSTIFY POSSESSION. A lease and bond of a mining claim from an administrator under order of court and by consent of all persons interested and possession taken thereunder is a sufficient showing of title to justify possession and support an action of ejectment against a mere trespasser. (*Wilson v. Triumph etc. Co.*, 718.)

12. MINES AND MINING—MINING LEASE—CONSTRUCTION OF.—If the lessees of a mine agree with the owner to operate the mine in consideration of the owner's furnishing all necessary supplies, and that the net proceeds of the ore after milling shall be equally divided between the parties, in determining such net proceeds only the cost of smelting, and not the cost of mining, hoisting, and handling the ore, should be deducted from the gross proceeds. (*Yank v. Bordeaux*, 522.)

13. MINING LEASE — FORFEITURE — RIGHT TO ORE MINED.—The title of a purchaser of ore from one who obtained it from the lessees of a mine is not affected by a forfeiture of the lease after such ore has been mined, in the absence of an express agreement that such forfeiture carried with it the right to ore previously mined. (*Yank v. Bordeaux*, 522.)

See Adverse Possession, 1; Instructions, 6.

MONOPOLY.

MONOPOLY.—RESTRICTIONS OF THE ASSOCIATED PRESS, through its by-laws and contracts, whereby its members are prevented from procuring news for publication from any other source than itself, tend to create a monopoly, and are illegal and void. (*Inter-Ocean Pub. Co. v. Associated Press*, 184.)

MORTGAGES.

1. MORTGAGES—ASSUMPTION OF MORTGAGE DEBT—NONLIABILITY.—A grantee of mortgaged premises, who accepts a deed thereto and agrees therein to pay the mortgage debt, is not personally answerable therefor if his immediate grantor was not personally bound. (*Young Men's Christian Assn. v. Croft*, 548.)

2. MORTGAGES—FRAUD—JUDICIAL SALES—ESTOPPEL.—A judgment creditor, against whom a mortgage is fraudulent, can-

not, after purchasing the property at a judicial sale under his judgment, question the validity of the mortgage. He cannot use the mortgage to prevent competition at the sale under which he purchases, and then set up the debtor's fraud to vitiate the mortgage. (*Belcher v. Curtis*, 376.)

3. MORTGAGES—WITHHOLDING FROM RECORD—FORECLOSURE—CONFESSION OF JUDGMENT.—A mortgagee seeking to foreclose a mortgage withheld by him from record to enable the mortgagor, a partnership, to obtain credit, cannot question a judgment by confession in favor of a creditor who extends credit in reliance upon the record, upon the ground that such confession of judgment is signed by only one of the partners, if the partner not signing raises no question as to its validity. (*Belcher v. Curtis*, 376.)

4. MORTGAGES—WITHHOLDING FROM RECORD—FRAUD ON CREDITORS.—Withholding a mortgage from record to enable the mortgagor to obtain credit is a fraud upon such creditors as extend credit in reliance upon the mortgagor's unencumbered title. (*Belcher v. Curtis*, 376.)

5. MORTGAGES—INTEREST—LIFE TENANT AND REMAINDERMAN.—As between the owners of the fee and the life estate in mortgaged property, the owner of the life estate is charged with the duty of paying interest upon the encumbrance, and the life tenant cannot, by neglecting this duty and allowing the mortgage to be foreclosed, acquire title through the foreclosure sale, and cut off the remainderman. (*Bowen v. Brogan*, 387.)

6. MORTGAGES—FORECLOSURE.—No legal title is obtained by the foreclosure of a mortgage upon which nothing is due at the time of the foreclosure. (*Bowen v. Brogan*, 387.)

7. MORTGAGES—IRREGULAR FORECLOSURE.—Ejectment may be maintained against a mortgagor in possession under a void or irregular foreclosure. (*Bowen v. Brogan*, 387.)

8. MORTGAGES—IRREGULAR FORECLOSURE—EJECTMENT—CONTRIBUTION BY REMAINDERMAN.—A grantee of a deceased life tenant in possession of the property under a void foreclosure of a mortgage cannot enforce contribution from the remainderman as a condition precedent to the latter's recovery in ejectment. (*Bowen v. Brogan*, 387.)

9. MORTGAGES—FORECLOSURE FOR PART OF CLAIM—REDEMPTION—EXTINGUISHMENT OF LIEN.—If the holder of subsequent mortgages on property buys the first mortgage, which he forecloses, and purchases the property for the amount of the decree, without mention in any of the proceedings of the other mortgages held by him, and makes no attempt to redeem from himself, but accepts the redemption money without protest, the lien of the subsequent mortgages is thereby extinguished, and one who owns the mortgagor's equity of redemption is entitled to their release upon paying the amount of the judgment, interest, and costs in the foreclosure case. (*Wells v. Ordway*, 209.)

10. MORTGAGES—SUBSEQUENT JUDGMENT—PRIORITY.—THE LIEN of a judgment is subordinate to that of an unrecorded mortgage executed prior to the rendition of the judgment. (*Dawson v. McCarty*, 841.)

See *Landlord and Tenant*, 5; *Mechanics' Liens*, 4; *Negotiable Instruments*, 2; *Taxes*, 16.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—DISCRETIONARY POWERS—LIABILITY IN DAMAGES.—Municipal corporations are not

liable to an action for damages, either for the nonexercise of, or for the manner in which in good faith they exercise, discretionary powers of a legislative character. (*Ewen v. Philadelphia*, 712.)

2. MUNICIPAL CORPORATIONS—DISCRETIONARY POWERS—DUTY TO GUARD DAM.—If a river is slackwater navigation, made so by a municipal corporation, duly authorized by statute, with power to erect dams, locks, and other appliances necessary for the purpose, and subject to a duty to maintain the navigation in a manner for practical use, such city is not subject to any duty to maintain safeguards across the river above a dam erected by it. in order to prevent boats or vessels from floating over such dam. (*Ewen v. Philadelphia*, 712.)

3. MUNICIPAL CORPORATIONS—POWER OF, TO ABATE NUISANCES.—The power to prevent and abate nuisances, conferred upon a city in general terms, does not authorize the extra-judicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such. (*Bristol Door etc. Co. v. Bristol*, 783.)

4. MUNICIPAL CORPORATIONS.—THE RESPONSIBILITY OF A CITY FOR THE ACTS OF ITS OFFICERS OR AGENTS does not depend upon the manner of their appointment, but upon the duty imposed upon them. If such duty appertains to mere political or governmental affairs, the municipality is not answerable; but if it pertains to the private affairs of the corporation, it is liable for their negligence, the same as a private individual. (*Esberg Cigar Co. v. Portland*, 651.)

5. MUNICIPAL CORPORATIONS—LIABILITY OF, FOR NEGLIGENCE OF LEGISLATIVE AGENTS.—If a city, having statutory authority to construct, maintain, and operate waterworks, adopts a charter which vests the exercise of this power in a water committee, for the benefit of the city, it thereby makes the committee its agents to carry out the work, though the members thereof were appointed by the legislature, and the municipality is answerable, under the doctrine of respondeat superior, for their negligence in maintaining such works. (*Esberg Cigar Co. v. Portland*, 651.)

6. MUNICIPAL CORPORATIONS—EXEMPTION FROM LIABILITY FOR NEGLIGENCE AS TO WATERWORKS.—A city owning waterworks in its private capacity, though constructed and maintained under statutory authority, is not exempt from liability for negligence in the construction and maintenance of such works on the ground that the legislature has appointed a water committee to control the works, and that the committee is an independent body, over which the city has no control. (*Esberg Cigar Co. v. Portland*, 651.)

7. MUNICIPAL CORPORATIONS — NEGLIGENCE AS TO WATERWORKS—LIABILITY.—When a city voluntarily undertakes to construct and maintain waterworks, in pursuance of statutory authority, for its own private emolument and advantage, the works belong to it in its private, rather than in its public or governmental, capacity, though the public may derive a common benefit therefrom, and the city is, therefore, answerable to persons injured by negligence in the construction or maintenance of such works. (*Esberg Cigar Co. v. Portland*, 651.)

8. MUNICIPAL CORPORATIONS—DANGEROUS PREMISES—NUISANCE.—A city cannot be held liable for an injury occurring upon the land of another owner, upon the ground that the place where it occurs is a nuisance and that the city has failed to abate it. (*Arnold v. St. Louis*, 447.)

9. MUNICIPAL CORPORATIONS—DANGEROUS PREMISES.

In an action against a municipal corporation to recover damages for the death of children drowned while skating on an uninclosed pond located partly on a street and partly on adjoining land, no recovery can be had unless it is alleged and proved that the accident happened on that portion of the pond located in the street. (*Arnold v. St. Louis*, 447.)

10. MUNICIPAL CORPORATIONS—DANGEROUS PREMISES—POND IN STREET.

In an action to recover damages for the death of children drowned while skating upon an uninclosed pond located on a public street, upon which such children ventured voluntarily and without invitation, the city cannot be held liable upon the ground that the pond, when covered with ice, was attractive to children and negligently left unguarded. As such children were not using the street for the purpose of travel, the rule which requires cities to keep their streets in a reasonably safe condition for pedestrians does not apply, and as such children went upon the ice to skate and, while skating thereon, were drowned, the city was not negligent in not inclosing or guarding such pond, and cannot be held liable in damages for their death. (*Arnold v. St. Louis*, 447.)

11. MUNICIPAL CORPORATIONS—DEFECTIVE SIDE-

WALKS.—In order to render a city liable to a pedestrian for failure to remedy a defect in a sidewalk, it must appear that the city had a reasonable opportunity of doing so, and, in order that that may appear, it must be shown, either that the city had notice of the defect, or that it was so obvious or had existed for such a length of time as to indicate that the city would have known it if it had exercised proper care in observing the conditions of its streets. Even after notice of the defect, the city is entitled to a reasonable time in which to make repairs, and is not liable until it has neglected such opportunity. (*Baustian v. Young*, 462.)

12. REAL PROPERTY—SIDEWALKS—DUTY OF ABUTTING

OWNER.—An abutting property owner is not under any duty to keep the sidewalk in front of his premises in repair and safe for the public, nor is he liable for failure to do so to a person who is injured by a defect therein. (*Baustian v. Young*, 462.)

13. MUNICIPAL CORPORATIONS—DEFECTIVE FOOTWAY—LIABILITY FOR INJURY TO INFANT—PROPER INSTRU-

CTION.—A city is bound to keep its streets, bridges, and walkways in a reasonably safe condition for the use of the public, and, if it fails to use reasonable care in doing so, and an infant, exercising such a degree of care and caution as, under the circumstances, might be expected from one of the child's age and intelligence, is injured by reason of such failure, the city is answerable for the injury. To instruct the jury, in such a case, that the city must keep its sidewalks, etc., in a reasonably safe condition for "all persons" who use them is not objectionable, because the words "all persons" mean the public. (*Roanoke v. Shull*, 791.)

14. MUNICIPAL CORPORATIONS—DEFECTIVE FOOTWAY—LIABILITY—IMMATERIAL EVIDENCE.

The liability of a city for injuries caused by its negligence in not keeping its streets and walkways in a reasonably safe condition for the use of the public, extends to the limits of the territory embraced in its charter, and it cannot evade its liability by showing that it has laid out more streets, sidewalks, and footways for the use of the public than it can keep in a reasonably safe condition. Hence, in an action by an infant against a city to recover damages for an injury caused by stepping into a hole in a sidewalk or footway, evidence on the part of the city as to how many miles of streets it has in imma-

terial, and it is proper to refuse to permit a witness to answer such a question. (*Roanoke v. Shull*, 791.)

15. MUNICIPAL CORPORATIONS—DEFECTIVE FOOTWAY—NEGLIGENCE—ORDINARY CARE—EXPERT TESTIMONY.—In an action by an infant against a city to recover damages for an injury caused by stepping into a hole in a sidewalk or footway, it is proper not to permit a witness for the defendant to answer the question: "Could not a person, exercising ordinary care, have seen the hole in the sidewalk, and avoided stepping into it?" The question of "ordinary care" is one for the jury to pass upon in view of all the circumstances, the age of the plaintiff being one of the facts to be considered. Expert testimony upon the question is not admissible. (*Roanoke v. Shull*, 791.)

16. MUNICIPAL CORPORATIONS—VOID ORDINANCES.—An ordinance making it unlawful for any "person, firm, or corporation, engaged in selling drygoods, clothing, jewelry, and drugs, to have exposed for sale, or sell to any person, firm, or corporation, any meats, fish, butter, cheese, lard, vegetables, or any other provisions, is not a health regulation, but a purely arbitrary prohibition, and void as an interference with property rights guaranteed by both the state and the federal constitutions. (*Chicago v. Netcher*, 93.)

17. CONSTITUTIONAL LAW—VOID ORDINANCES.—If an owner is deprived by municipal ordinance of the right to expose for sale and sell his property, when the sale thereof is not injurious, he is deprived of property within the meaning of the constitutional inhibition by taking away one of the incidents of ownership. (*Chicago v. Netcher*, 93.)

18. MUNICIPAL CORPORATIONS — VOID ORDINANCES—SALE OF INTOXICATING LIQUORS.—A municipal ordinance making it unlawful for any person, firm, or corporation to expose for sale or sell any intoxicating, malt, or fermented liquor in any place of business where drygoods, clothing, jewelry, or hardware are sold, is unreasonable and void as to a drygoods dealer who sells intoxicating liquor in sealed packages only, and not for consumption on the premises. Such restriction is purely arbitrary, and is an illegal discrimination, not having any connection with and not tending in any way toward the protection of the public against the evils arising from the sale of intoxicating liquors. (*Chicago v. Netcher*, 93.)

See Attachment, 1; Counties; Injunctions, 1; Rewards.

NEGLIGENCE.

1. NEGLIGENCE—USE OF CARE—WHEN A QUESTION OF FACT.—In an action for personal injuries, the question as to whether the defendant used proper care is one of fact for the jury, where, under the evidence, it is not free from doubt. (*Lane v. Spokane etc. Ry. Co.*, 821.)

2. NEGLIGENCE — ACTION FOR INJURIES BEFORE BIRTH.—A child before birth is, in fact, a part of the mother, and while an unborn child is regarded as in being for some purposes, it is not such a distinct being as will permit of an action by it to recover for injuries occasioned before its birth. (*Allaire v. St. Luke's Hospital*, 176.)

3. NEGLIGENCE—RECOVERY FOR FRIGHT—ALLEGING GROSS NEGLIGENCE.—The rule that there can be no recovery for sickness due to the purely internal operation of fright caused by a negligent act cannot be avoided by calling the negligence gross and alleging that the defendant ought to have known that

the result complained of would follow his act. (*Smith v. Postal Tel. Cable Co.*, 374.)

4. NEGLIGENCE — DANGEROUS PREMISES — TRESPASSERS.—In order to recover damages for the death of children drowned while skating upon an uninclosed pond on defendant's land, there must be allegation and proof that such children were on the premises by permission or invitation of the defendant. Otherwise, it must be presumed that they were trespassers and their representatives without remedy against the defendant. (*Arnold v. St. Louis*, 447.)

5. NEGLIGENCE OF PARENTS—IMPUTING TO CHILD.—The negligence of parents in allowing their child to go, unattended, upon a bridge or sidewalk in a city, where it is injured by reason of the defective condition of the footway, cannot be imputed to the infant. (*Roanoke v. Shull*, 791.)

6. NEGLIGENCE — INFANTS — CONTRIBUTORY NEGLIGENCE—REBUTTING PRESUMPTION.—The law presumes that a child between seven and fourteen years of age cannot be guilty of contributory negligence. Hence, to establish that a child of that age is capable of contributory negligence, such presumption must be rebutted by evidence and circumstances establishing the maturity and capacity of the infant. (*Roanoke v. Shull*, 791.)

7. NEGLIGENCE, CONTRIBUTORY—STANDING IN AISLE OF CAR.—A passenger on a railway train, injured by an engine bumping forcibly against cars, is not, as a matter of law, guilty of contributory negligence because he was standing in the aisle of a coach at the time of the collision. (*Lane v. Spokane etc. Ry. Co.*, 821.)

8. NEGLIGENCE—PRESUMPTION OF, FROM ACCIDENT.—Whenever a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from a want of care. (*Esberg Cigar Co. v. Portland*, 651.)

9. NEGLIGENCE IN CONSTRUCTION OF WATER MAIN—EVIDENCE OF—SUBMISSION TO JURY.—The question as to whether a certain water main in a city was negligently constructed should be submitted to the jury, where there is evidence that it had burst twice before under an ordinary pressure; that a pipe of that size and thickness, if properly constructed and laid, would not ordinarily burst under such a pressure; and that there was no extraordinary or unusual pressure upon the pipe when it burst the third time. (*Esberg Cigar Co. v. Portland*, 651.)

10. NEGLIGENCE—PROXIMATE CAUSE.—A man is answerable for the consequences of a fault only so far as they are natural or proximate, or may on this account be foreseen by ordinary forecast, and not for those which arise from a conjunction of his fault with circumstances of an extraordinary nature. (*Roach v. Kelly*, 685.)

11. NEGLIGENCE—PROXIMATE CAUSE.—If a saloon-keeper furnishes liquor to an intoxicated man, who quarrels with another man in the saloon, and then leaves and quarrels with a second man, afterward proceeding to a private lot, where he whips his second opponent and then engages in a fight with his first opponent, and upon the approach of the police runs away, slipping down a steep bank, falling into a sewer and breaking his neck, the furnishing of

the liquor is so remote from the injury that it cannot be made the basis of a recovery. (*Roach v. Kelly*, 685.)

See *Municipal Corporations*, 5-7.

NEGOTIABLE INSTRUMENTS.

1. **NEGOTIABLE INSTRUMENTS — INDORSEMENT "FOR COLLECTION," AND CANCELLATION THEREOF—EFFECT OF, ON NEGOTIABILITY.**—An indorsement "for collection" destroys the negotiability of a promissory note, but a cancellation of the indorsement restores the negotiability of the note. (*Cussen v. Brandt*, 762.)

2. **NEGOTIABLE INSTRUMENTS — STIPULATIONS IN MORTGAGE—EFFECT ON NOTE.**—The amount to be paid on a note is not rendered uncertain by stipulations in a mortgage, given to secure it, for costs, taxes, assessments, insurance, and attorneys' fees in case of foreclosure, and the note is negotiable notwithstanding such provisions. (*Hunter v. Clarke*, 160.)

3. **NEGOTIABLE INSTRUMENTS — NEGOTIABILITY.** — A PROVISION in a note that upon a certain contingency the holder shall have the option to declare it due before the date fixed for its maturity does not destroy its negotiability. (*Hunter v. Clarke*, 160.)

4. **NEGOTIABLE INSTRUMENTS — PURCHASE FROM AGENT "FOR COLLECTION"—LEGIBLE CANCELLATION OF INDORSEMENT—NOTICE OF TITLE.**—If a bank holds a negotiable promissory note for collection, a buyer of the note is charged with notice of the bank's title, where an indorsement on the note, "for collection," has been canceled, but the indorsement is still legible through the pen marks by which it was canceled, for this is sufficient to put him upon inquiry. (*Cussen v. Brandt*, 762.)

5. **NEGOTIABLE INSTRUMENTS—PURCHASE OF, FROM AGENT FOR COLLECTION—TITLE—EQUITIES.**—The purchaser of an overdue negotiable note, from an agent for collection, takes it subject to all the equities to which it was subject in the hands of the agent. He acquires nothing but the actual right and title of the agent. (*Cussen v. Brandt*, 762.)

6. **NEGOTIABLE INSTRUMENTS — PURCHASE FROM AGENT "FOR COLLECTION"—NOTICE OF TITLE—PRIORITY OF PAYMENT.**—If one gives a series of negotiable promissory notes, secured by a deed of trust on real estate, payable in the order of their maturity, and two of the notes, being in the hands of a bank for collection, are purchased by a person under circumstances properly charging the buyer with notice of the bank's title, the lien of the notes so purchased is subordinate to that of a matured, unpaid note in the hands of the original owner, and the latter must be paid first, where the trust property is ordered to be sold. (*Cussen v. Brandt*, 762.)

7. **NEGOTIABLE INSTRUMENTS—PURCHASE AND NOT A PAYMENT—WHAT IS.**—When a note is taken up by a stranger, who is neither a party to the paper, nor bound, in any way, for its payment, the transaction is a purchase, and not a payment, where it clearly appears from the evidence that he did not intend to satisfy or discharge the note, but to purchase it as an investment. (*Cussen v. Brandt*, 762.)

8. **NEGOTIABLE INSTRUMENTS—PAYMENT—NOTICE OF NONPAYMENT.**—The maker of a negotiable instrument is not by law entitled to notice of maturity and nonpayment. The fact that a bank pledges of a note fails, by agreement with the payee, to

notify the maker that the note has been discounted, does not constitute a fraud upon the maker or warrant him in paying the note to the original payee without requiring him to produce and surrender it. (*Tuck v. National Bank of Athens*, 69.)

9. **NEGOTIABLE INSTRUMENTS — PAYMENT — EXTINGUISHMENT.**—When a person who is primarily bound for the payment of a note takes it up, it is a payment, and the note is extinguished, whatever the payer's intention may have been. (*Cussen v. Brandt*, 762.)

See Assignment for Benefit of Creditors, 1; Bankruptcy, 3.

NEW TRIAL.

1. **NEW TRIAL—INSTRUCTIONS—JUDGMENT FOR RIGHT PERSON.**—Although instructions given were erroneous, a motion for a new trial must be denied, if the verdict was unquestionably for the right party. (*Baustian v. Young*, 462.)

2. **NEW TRIAL — INSUFFICIENT EVIDENCE.**—The trial court is justified in granting a motion for a new trial, after verdict, when he believes that the evidence is insufficient to support the verdict, and such evidence is conflicting. (*Butte etc. Min. Co. v. Societe Anonyme etc.*, 505.)

3. **NEW TRIAL—SETTING ASIDE VERDICT—EXCESSIVE DAMAGES.**—An appellate court will not set aside the verdict of a jury in a suit for damages, and grant the defendant a new trial, on the ground that the verdict is excessive, and contrary to the law and the evidence, where it can neither say that the verdict is without evidence to sustain it, nor that the evidence is insufficient to support the verdict. (*Roanoke v. Shull*, 791.)

NONRESIDENTS.

See Attachment, 3; Judgments, 11, 12; Jurisdiction, 2, 3.

NONSUPPORT OF FAMILY.

See Criminal Law, 6; Husband and Wife, 15.

NOTICE.

See Fraudulent Conveyances, 6, 7; Landlord and Tenant, 7; Mines and Mining, 5; Negotiable Instruments, 6, 8.

NUISANCE.

1. **NUISANCE—OBSTRUCTION OF HIGHWAY—SUIT BY PRIVATE PERSON TO ENJOIN.**—Under a statute which authorizes a private person to maintain a civil action for a public nuisance, where it is specially injurious to him, he may maintain an action to enjoin the obstruction of a public highway as a public nuisance, where he owns a farm, orchard, and nursery adjacent to the road and there is no outlet to market for the products of his farm, orchard, and nursery, excepting by such highway. (*Smith v. Mitchell*, 858.)

2. **NUISANCE—THE DESTRUCTION OF A BUILDING, AS A NUISANCE, IS NOT JUSTIFIED** on the ground that it is not kept as clean as it should be in the interest of public health; or that its use diminishes the value of surrounding property; or that the structure is unsightly; or that it is occupied, or resorted to, by lewd or disorderly persons. (*Bristol Door etc. Co. v. Bristol*, 783.)

2. NUISANCE.—A BUILDING CANNOT BE ABATED AS A NUISANCE, when it is not the building itself, but only its use, which constitutes the nuisance. (*Bristol Door etc. Co. v. Bristol*, 783.)

See *Municipal Corporations*, 2.

OFFICERS.

OFFICERS—SURETIES ON COUNTY TREASURER'S BOND—LIABILITY OF.—If a county treasurer collects money by virtue of his office, but absconds therewith after the expiration of his term and before his successor has qualified, the sureties on his bond are answerable therefor where the conditions of the bond signed by them required the payment of the money in question to some one authorized to receive it and this was not done. (*Plymouth County v. Kerseboom*, 257.)

See *Executions*, 6; *Franchises*; *Municipal Corporations*, 4; *Process*, 8, 9.

OIL LEASES.

See *Landlord and Tenant*, 8-10; *Specific Performance*.

PARENT AND CHILD.

See *Negligence*, 5.

PARTNERSHIP.

PARTNERSHIP—PREFERENCES BY.—The principle that the assets of a partnership are for distribution to their creditors does not obtain, without regard to rights already existing. The right to have partnership property first applied to partnership debts is one primarily for the benefit of the partners, and, if they waive such right, firm creditors cannot invoke it to secure preferences over mortgage creditors of the partnership. (*Noyes v. Ross*, 543.)

PERJURY.

See *Judgments*, 14, 15.

PERPETUITIES.

See *Wills*, 8, 9.

PHOTOGRAPHS.

See *Evidence*, 2-7.

PLEADING.

See *Adoption*, 2, 3; *Marriage and Divorce*, 2; *Mechanics' Liens*, 3; *Replevin*, 1.

POLICE POWER.

1. CONSTITUTIONAL LAW—POLICE POWER.—In order to sustain legislative interference with the business of the citizen by virtue of the police power, either under a statute or a municipal ordinance, it is necessary that the act should have some reasonable relation to the subjects included in such power. It must tend in some degree toward the prevention of offenses, or preservation of

the public health, morals, safety, or welfare. (*Chicago v. Netcher*, 98.)

2. **CONSTITUTIONAL LAW—POLICE REGULATION.**—The legislature has power to form classes for the purpose of police regulation, if it does not arbitrarily discriminate between persons in substantially the same situation. (*Lasher v. People*, 108.)

PREFERENCES.

See Chattel Mortgages, 9; Corporations, 20-23; Partnership.

PRESCRIPTION.

See Adverse Possession; Highways, 1, 2.

PRESUMPTIONS.

See Appeal, 19, 20; Corporations, 23; Evidence; Executions, 9; Fraudulent Conveyances, 2, 8; Negligence, 8.

PRIVILEGED COMMUNICATIONS.

See Witnesses, 6-8.

PROCESS.

1. **PROCESS—ORDER FOR PUBLICATION—CONSTRUCTION OF STATUTES.**—A statute which merely gives a right to proceed by the publication of summons does not affect a statute which prescribes the method of such procedure. (*Bank of Colfax v. Richardson*, 664.)

2. **PROCESS—ORDER FOR PUBLICATION—AFFIDAVIT AS TO RESIDENCE—SUFFICIENCY OF.**—An affidavit for the publication of summons, which states that the defendant resides in another state, naming it, and that he is not within the state where suit is brought, shows that the defendant cannot be served within the state, and is, therefore, sufficient as against a collateral attack. (*Bank of Colfax v. Richardson*, 664.)

3. **PROCESS—ORDER FOR PUBLICATION—SUFFICIENCY OF AFFIDAVIT.**—In an action against a nonresident, an affidavit reciting that an attachment has been levied on certain real property of the defendant, in a certain county in the state, naming it, sufficiently shows that he has property within the state. Hence, such affidavit is sufficient, on a collateral attack, to sustain an order for publication of the summons. (*Bank of Colfax v. Richardson*, 664.)

4. **PROCESS—ORDER FOR PUBLICATION—MAILING SUMMONS "FORTHWITH."**—Although a statute provides that an order for the publication of summons shall direct that a copy of the complaint and summons be deposited forthwith in the postoffice, addressed to the defendant, the omission of the word "forthwith" from such an order is not regarded, on collateral attack, as fatal to the proceedings, when it appears that the copies were in fact mailed within a reasonable time after the date of the order. (*Bank of Colfax v. Richardson*, 664.)

5. **PROCESS.—A SUMMONS IS MAILED "FORTHWITH,"** within the meaning of a statute which requires such mailing, when it is deposited in the postoffice on the day that the summons is first published, if such publication itself is made within a reasonable time after the date of the order, as in the first weekly issue of the

newspaper following such date. (*Bank of Colfax v. Richardson*, 664.)

6. **PROCESS—ORDER FOR PUBLICATION—DEPOSIT OF COPIES—WHO MAY MAKE—CERTIFICATION.**—It is not required that the proof of a deposit of the complaint and summons in the postoffice, pursuant to an order for service by publication, shall be made by the sheriff or his deputy, or by a person specially appointed for that purpose. It may be made by anyone competent to make the required proof, and it is not necessary that the copy of the summons so deposited should be certified. (*Bank of Colfax v. Richardson*, 664.)

7. **PROCESS—ORDER FOR PUBLICATION—NECESSITY OF RETURN, "NOT FOUND."**—A return of summons, "not found," is not essential to a valid order for service by publication, under a statute which provides that the fact that the defendant cannot be found shall appear by affidavit. (*Bank of Colfax v. Richardson*, 664.)

8. **SHERIFFS.**—A RETURN ON A WRIT OR PROCESS is the short official statement of the officer, indorsed thereon, of what he has done in obedience to the mandate of the writ, or why he has done nothing. (*Rowe v. Hardy*, 811.)

9. **SHERIFFS—RETURN—SUFFICIENCY OF.**—A return, by a sheriff, on a writ or process, of any fact showing why, without fault or negligence on his part, he has been prevented from complying with the mandate of the writ, is, when indorsed upon the writ or process, a sufficient return. (*Rowe v. Hardy*, 811.)

See Attachment, 9, 10; Judgments, 8, 9, 12.

PROXIMATE CAUSE.

See Negligence, 10, 11.

PUBLIC LAND.

PUBLIC LAND—CANCELLATION OF ENTRY—COLLATERAL ATTACK.—The power of the land department of the government to cancel a public land entry for fraud can be exercised only after notice to and a hearing of the interested parties. Cancellation of such entry without a hearing is a nullity and may be collaterally attacked. (*Delles v. Second Nat. Bank*, 875.)

RAILROAD COMPANIES.

RAILROADS—LIABILITY FOR ASSAULT OF EMPLOYE.—Where a person who is permitted to remain in a depot at a time when passengers are not usually allowed there leaves it, and is later discovered in a car by the night watchman in an act of gross immorality, and upon being compelled to come out of the car curses and abuses the watchman and finally assaults him, and the watchman strikes him on the head, the railroad company is not liable for the assault made by the watchman, whether disproportioned to the insult or not. (*Georgia etc. R. R. Co. v. Hopkins*, 89.)

REAL PROPERTY.

See Attachment, 2, 4, 8; Deeds.

REASONABLE DOUBT.

See Instructions, 10; Evidence, 2.

RECEIVERS.

1. RECEIVERS—POWERS—OPENING JUDGMENT AGAINST CORPORATION.—Where, through fraud and collusion, a judgment has been obtained against a corporation after the appointment of a receiver to wind up its affairs, the effect of which judgment is to diminish the estate which should properly come to the receiver, such receiver may move to reopen the judgment and be allowed to enter a defense. (*Peabody v. New England Waterworks Co.*, 195.)

2. RECEIVERS—POWERS.—A receiver appointed to wind up the affairs of a corporation represents not only the corporation but also its creditors, and as the representative of the creditors he is invested with powers and may do acts that could not be done by a mere representative of the corporation. (*Peabody v. New England Waterworks Co.*, 195.)

RECORDING INSTRUMENTS.

See Deeds, 6, 7; Gifts, 2; Limitation of Actions, 3, 4; Mortgages, 3, 4.

REPLEVIN.

1. REPLEVIN—PLEADING.—The defendant in replevin cannot disclaim property in himself by plea, and then attempt to prove property in himself when he has filed no plea making that an issue. (*Wiley v. McGrath*, 709.)

2. REPLEVIN—EVIDENCE.—In replevin, a married woman claiming the contents of a livery stable sold to her by her husband, under a bill of sale may, in addition to such bill of sale, offer in evidence the lease of the stable and an assignment to her by her husband of a policy of insurance on the property as cumulative evidence of the exclusive, open, and notorious character of her tenancy and possession. (*Wiley v. McGrath*, 709.)

3. REPLEVIN—EVIDENCE OF OWNERSHIP—CHATTEL MORTGAGE AS.—A chattel mortgage is a conditional sale of personal property, and, after a breach of the condition, the mortgagee has a qualified ownership in the property mortgaged. Hence, if the mortgagee, after default, brings an action to recover the property, or damages for its detention, in case a delivery cannot be had, the mortgage is evidence of such ownership, and is admissible in evidence to prove it, even under an allegation of absolute ownership. (*Reinstein v. Roberts*, 564.)

4. REPLEVIN.—PUNITIVE DAMAGES in replevin may be allowed in all cases where there has been peculiar circumstances of outrage, oppression, and wrong in the taking or detention of the property. (*Wiley v. McGrath*, 709.)

See Cemeteries.

RES GESTAE.

See Trial, 7.

RESIDUARY LEGATEE.

See Wills, 10.

RESIDENCE.

See Domicile.

RHS JUDICATA.

See Judgments, 16, 17.

RESTRAINT OF TRADE.

See Contracts, 1-3.

REVENUE STAMPS.

See Appeal, 1.

REWARDS.

MUNICIPAL CORPORATIONS—POWER TO OFFER REWARDS.—A municipal corporation, authorized to provide for the preservation of public property, and to adopt ordinances and make regulations for the safety and general welfare of its inhabitants, has power to offer a reward for the apprehension and conviction of incendiaries who have destroyed property within its limits. (*People v. Holly*, 485.)

RIGHT OF WAY.

See Easements.

SALES.

1. **SALE OF FRUIT TO BE SHIPPED—BUYER'S RISK.**—Where the owners and shippers of fruit sell it at the "buyer's risk," such term places upon the purchaser the risks of transportation alone, after the title has passed to him, but all risks incident to defective cars and improper packing at the point of shipment are assumed by the shipper. (*Rose v. Weinberger*, 73.)

2. **SALE OF FRUIT IN TRANSIT—BUYER'S RISK.**—Where fruit already in transit is bought from one who the buyer knows is not the shipper, and the purchase is at the "buyer's risk," the term "buyer's risk" places upon the buyer all risk of damage caused by defective cars, improper packing, and decay of fruit. (*Rose v. Weinberger*, 73.)

3. **SALE.—THE RIGHT OF STOPPAGE IN TRANSITU CAN BE DEFEATED** only by an actual delivery of the goods to the consignee or to some one for him, or by an assignment of the bill of lading to a bona fide purchaser without notice that the goods had not been paid for. (*Branan v. Atlanta etc. R. R. Co.*, 26.)

4. **SALE.—STOPPAGE IN TRANSITU** is the right which a vendor has, when he sells goods on credit to another, of resuming possession of the goods while they are in the possession of the carrier or middleman in the transit to the consignee or vendee and before they come into his actual possession or the destination he has appointed for them, on his becoming bankrupt and insolvent. (*Branan v. Atlanta etc. R. R. Co.*, 26.)

5. **SALES—SOLVENCY OF BUYER—REPRESENTATIONS.**—A letter ordering goods to be shipped in carload lots, and agreeing to accept time drafts for the cost of filling the order and to send a check for the balance of the price when the car is unloaded is not a representation that the writer is solvent. (*Skinner v. Michigan Hoop Co.*, 418.)

6. **SALES—FRAUDULENT PURCHASE—GOODS IN TRANSIT.**—A sale is not rendered fraudulent so as to entitle the seller to rescind, if the purchaser conceives the intention while the goods are in transit of not paying for them. (*Skinner v. Michigan Hoop Co.*, 418.)

7. SALES—FRAUDULENT PURCHASE—RETURN OF CONSIDERATION.—Plaintiff in replevin for goods fraudulently purchased need not tender back past due negotiable paper, provided it is made to appear that it is still held and owned by the payee, and not by a bona fide purchaser for value. (*Skinner v. Michigan Hoop Co.*, 413.)

8. SALES—RESCISSION.—A sale may be rescinded, and the property recovered, if the buyer, at the time of purchasing, was insolvent or in failing circumstances, and did not intend to pay for the goods, or had no reasonable expectation of doing so, and fraudulently misrepresented or concealed the facts. (*Skinner v. Michigan Hoop Co.*, 413.)

SEALS.

See Corporations, 23.

SENTENCE.

See Criminal Law, 14.

SHERIFFS.

See Process, 8, 9.

SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE—IMPLIED COVENANTS—OIL LEASE.—A court of equity has no jurisdiction to specifically enforce implied covenants in an oil and gas lease, unless it appears that the lessee is fraudulently evading his obligations to the lessor. (*Coglan v. Forest Oil Co.*, 695.)

STARE DECISIS.

See Appeal, 21; Judgments, 12.

STATUTE OF FRAUDS.

See Insurance, 8; Mechanics' Liens, 2.

STATUTES.

1. STATUTES—CONSTRUCTION—PROSPECTIVE AND RETROSPECTIVE LAWS.—A statute should be given a prospective operation only, unless it plainly appears that it was intended to have a retrospective force. (*Seton v. Hoyt*, 641.)

2. STATUTES—INTERPRETATION—COMPETENCY OF WITNESSES.—If the provisions of a statute are incorporated by reference into another statute, and the earlier statute is subsequently repealed, the provisions so incorporated continue in force so far as they form part of the second enactment. This rule applied to a statute making the wife a competent witness against her husband in cases growing out of his neglect or refusal to support his family. (*People v. Malsch*, 381.)

3. STATUTES—ENACTMENT OF—JOURNALS OF LEGISLATURE AS EVIDENCE TO IMPEACH.—The court has authority and it is its duty to examine the legislative journals to determine whether or not the statute in question was passed by a majority of the members elected to each house as required by the constitution, and if such journals affirmatively disclose that one section of such statute as enrolled and published did not finally pass

either branch of the legislature, and did not pass by a majority of the members elected to each house, such section is not a law and must be adjudged void. (*State v. Swan*, 889.)

4. **STATUTES—ENACTMENT OF.**—If a section of an act passed by the legislature as disclosed by the legislative journals is not copied in the enrollment, and does not receive executive approval, it does not become a law. (*State v. Swan*, 889.)

5. **STATUTES—ENACTMENT OF—PRESUMPTION—EVIDENCE.**—The presumption is that a statute found properly signed by the presiding officers of the legislature, approved by the governor, and deposited in the office of the secretary of state with the other acts of the session, was properly passed, which may be overcome only by evidence of which the courts take judicial notice showing the contrary; but, whenever the existence of a statute is called into question, the court may resort to any source of information capable of conveying to the judicial mind a clear and satisfactory answer to such question, and the legislative journals showing the final action of the legislature upon the final passage of such statute constitute a record, which may be resorted to, and which, by an affirmative showing to the contrary, is competent to overthrow the presumption arising from the certificates of such presiding officers, and the lodgment of the enrolled act with the secretary of state. (*State v. Swan*, 889.)

6. **STATUTES—ENACTMENT OF—RIGHT TO RESORT TO LEGISLATIVE JOURNALS TO IMPEACH STATUTE.**—Courts may consult the legislative journals in reference to a matter which the constitution expressly requires to be recorded therein concerning the procedure for the passage of the act, and if, upon such examination, it affirmatively appears, in respect to such requirements, that the bill did not in fact pass the legislature, or did not receive the constitutional majority, and therefore did not constitutionally become a law, such journals may be used to impeach the enrolled act, although the latter is signed by the presiding officers of both houses of the legislature, and carries the approval of the governor. (*State v. Swan*, 889.)

7. **STATUTES.—THE INVALIDITY OF ONE SECTION OF a statute which is in material relation to other portions thereof, so as to modify, restrict, or extend its application, invalidates the whole statute.** (*State v. Swan*, 889.)

8. **CONSTITUTIONAL LAW—DISCRIMINATION.**—An attempt by statute or municipal ordinance to deny a property right to a particular class in the community, where all other members of the community are left free to enjoy it, is unconstitutional and void. (*Chicago v. Netcher*, 93.)

9. **CONSTITUTIONAL LAW—CLASS LEGISLATION—COMMISSION BUSINESS.**—The business of dealing in small products of the farm on commission is of a nature which may be productive of great abuses, and the legislature may put such dealers into a separate class from other commission merchants, and enact regulating laws applicable to cities of such size as in the legislative judgment would permit the existence and growth of such abuses. (*Lasher v. People*, 108.)

10. **STATUTES—CONSTITUTIONALITY—IMPAIRING OBLIGATION OF CONTRACTS—RENTS AND PROFITS DURING PERIOD FOR REDEMPTION.**—A statute which entitles a judgment debtor whose real estate is sold on execution to possession, and to the rents, issues, and profits of the property during the period for redemption, is not unconstitutional as to a debt contracted before its passage, on the ground that it impairs the obli-

gation of a contract, although, under the statute existing when the debt was contracted, the purchaser at an execution sale was entitled to the rents and profits during such period. The creditor, under such a condition of the law, is not deprived of any remedy for the enforcement of his contract. (*Wilson v. Wold*, 848.)

STOPPAGE IN TRANSITU.

See Sales, 3, 4.

SUCCESSION.

See Descent.

SUMMONS.

See Judgments, 8, 9, 12; Process.

SURETYSHIP.

1. **SURETYSHIP—CONTRIBUTION—STATUTORY REMEDY CUMULATIVE.**—The summary proceeding by which, under the Montana Code of Civil Procedure, section 1242, a surety may enforce contribution from his cosurety under a judgment against them as such, is cumulative and not exclusive, and such surety may proceed to obtain relief by any recognized mode of procedure. (*Merchants' Nat. Bank v. Great Falls etc. Co.*, 499.)

2. **SURETYSHIP—ASSIGNMENT OF JUDGMENT—CONTRIBUTION.**—A surety who has paid a judgment against himself and his cosureties may take an assignment of it to himself and avail himself of it to enforce contribution from his nonpaying cosureties. (*Merchants' Nat. Bank v. Great Falls etc. Co.*, 499.)

3. **SURETYSHIP—SATISFACTION OF JUDGMENT—CONTRIBUTION.—EVIDENCE** that a surety, who has procured the satisfaction of a judgment against himself and his cosureties, which has been assigned to him for the purpose of enforcing contribution, did not intend to satisfy the judgment as to the nonpaying cosurety, is admissible in an action to enforce contribution from the latter. (*Merchants' Nat. Bank v. Great Falls etc. Co.*, 499.)

4. **SURETYSHIP—SATISFACTION OF JUDGMENT—RELEASE OF COSURETY.**—An entry of satisfaction of judgment against several cosureties, which judgment has been assigned to one of the sureties, who has paid it, to be kept alive by him for the purpose of enforcing contribution, does not inure to the benefit of a nonpaying cosurety, unless the intention was thereby to discharge him. (*Merchants' Nat. Bank v. Great Falls etc. Co.*, 499.)

See Officers.

TAXES.

1. **TAXATION—CORPORATE STOCK—WHERE TAXED.**—A share of stock in a corporation is personal property, and is taxable to the owner as other personal property at the place of his residence, whether the corporation is foreign or domestic. (*Greenleaf v. Board of Review*, 168.)

2. **TAXATION—UNIFORMITY.**—The mode of assessment, as concerns the rule as to uniformity of taxation does not mean that, in the case of the assessment of all kinds of taxable property, the same officers shall act, or that the proceedings touching the assessment shall be the same. There is a uniformity in the assessment and in the mode thereof, if the same basis of valuation is taken as to all property of like character. (*Kelley v. Rhoads*, 804.)

3. **TAXATION OF A PECULIAR CLASS OF PROPERTY—CONSTITUTIONAL LAW.**—As long as the rate and method of valuation are the same as in another class of property, a statute affecting the taxation of a peculiar class of property may be enacted to guard against its escape therefrom. Absolute equality in taxation is an impossibility. (*Kelley v. Rhoads*, 904.)

4. **TAXATION OF PROPERTY IN ANOTHER STATE.**—Personal property otherwise taxable in the state is not exempt from taxation because returned for assessment and taxation for the same year in another state. (*Kelley v. Rhoads*, 904.)

5. **TAXATION.—BEFORE PROPERTY CAN BE TAXED** it must have become identified and incorporated with the general mass of property in the state. (*Kelley v. Rhoads*, 904.)

6. **TAXATION OF MIGRATORY LIVESTOCK.**—If livestock are brought into the state for the purpose of grazing, it is immaterial how long they remain so far as their taxation is concerned. They may acquire a situs for that purpose and yet remain within the state but a comparatively short time. (*Kelley v. Rhoads*, 904.)

7. **TAXATION OF MIGRATORY LIVESTOCK.**—If it is found as a fact that livestock have been brought into the state in the first instance for use or to graze, and have on that account acquired a situs within the state for the purpose of taxation, and have subsequently been shipped out of the state, their shipment is not deemed to have commenced until they are started on their final journey out of the state. (*Kelley v. Rhoads*, 904.)

8. **TAXATION OF MIGRATORY LIVESTOCK.**—If one purpose in bringing livestock into the state is to drive them through on their journey to another state, then to determine whether there also exists an independent purpose of grazing them within the state so as to subject them to taxation therein, all of the facts must be considered, such as the course taken, the character of the territory grazed upon, the time employed, the subsequent method of intended shipment, the ordinary facilities for transportation by other means, the place selected for the commencement of the journey by rail, if that is in contemplation, possibly the time of year, the eventual purpose of their shipment, the character of the livestock, and the manner in which they are ordinarily kept, maintained, and grown, and in general every competent fact which tends to explain the purpose in view. (*Kelley v. Rhoads*, 904.)

9. **TAXATION OF MIGRATORY LIVESTOCK.**—If livestock are brought into the state to graze they are there to be maintained, and while there for that purpose they are as fully identified and incorporated with the other property of the state as it is possible for most livestock to become. The length of time that such property remains is immaterial if the purpose mentioned is present, and no question of interstate commerce is involved, in such case, which militates against the exercise by the state of its power of taxation. Neither in that event is a citizen of another state deprived of any of the immunities or privileges of a citizen of the state in which the stock is grazing, nor is the latter state attempting to make or enforce a law which abridges the rights of a citizen of the United States. (*Kelley v. Rhoads*, 904.)

10. **TAXATION OF MIGRATORY LIVESTOCK.**—If the purpose of an owner of livestock in bringing them into the state is not alone that of transportation, but comprehends also that of grazing and feeding them upon the natural grasses, which is their natural source of subsistence, not as a mere necessary incident of the travel, but as one of the purposes of such movement, they do not come within the rule which exempts personal property in transit from taxation

in the state in which the stock is thus brought and grazed. (Kelley v. Rhoads, 904.)

11. **TAXATION OF MIGRATORY LIVESTOCK—INTERSTATE COMMERCE—CONSTITUTIONAL LAW.**—A statute providing for the taxation of all livestock brought into the state for the purpose of being grazed therein does not encroach upon the exclusive right of Congress to regulate interstate commerce; nor is it void as being in conflict with any provision of the federal constitution. (Kelley v. Rhoads, 904.)

12. **TAXATION OF PROPERTY IN TRANSIT.**—Property engaged in interstate commerce, by being transported through a state on its journey from one state to another, is not subject to taxation in the state through which it is passing, as it does not acquire a situs therein. (Kelley v. Rhoads, 904.)

13. **TAXATION OF PROPERTY IN TRANSIT.**—A statute which in its terms provides for the taxation of property in transit from one state to another, or which, by its terms, seeks to impose more onerous burdens upon property shipped from a foreign jurisdiction to the state imposing the burden than is borne by like property in such state, is void as in conflict with the federal constitution. (Kelley v. Rhoads, 904.)

14. **TAXATION—INVOLUNTARY PAYMENT—RECOVERY.**—If a tax is paid after a refusal to pay it upon a demand of the officer, and to prevent the seizure and sale of the property taxed and the damages which would thereby accrue, the payment of the tax is involuntary and made under such circumstances as authorizes a recovery thereof if the tax proves to have been illegally levied. (Kelley v. Rhoads, 904.)

15. **TAXATION—RECOVERY OF TAXES PAID.**—An action to recover back taxes paid by the collecting officer into the county treasury must be brought against the county in its corporate name. (Kelley v. Rhoads, 904.)

16. **TAX SALE OF LAND ASSESSED AS ONE PARCEL BUT OWNED IN SEVERALTY—PURCHASE BY MORTGAGEE.**—If land owned by two persons in severalty is taxed as one parcel, a mortgagee of one owner cannot purchase the entire parcel at a tax sale, and acquire title, so as to divest the title of the other owner. (Cone v. Wood, 223.)

17. **TAX SALES—TENDER—VALID OFFER TO PAY TAXES—WHAT IS.**—In a suit to quiet title, an offer, in the answer, to pay taxes due on the property is not conditional, but is absolute and unconditional, where it is averred, in the pleading, that the defendant has, at all times, been ready and willing to pay the lawful amount of the taxes, tax sales, penalties, and interest chargeable on the property, and offers and tenders to pay it to the plaintiff, or into court, at any time, and to keep the tender and offer good whenever it shall be ascertained, or on demand. (Cone v. Wood, 223.)

18. **TAX SALES—VALIDITY OF—WHAT DOES NOT AFFECT.** In a suit to quiet title, where the validity of tax deeds is involved, the purpose of a mortgagee in taking and assigning tax sale certificates does not go to the validity of the tax sales. (Cone v. Wood, 223.)

19. **TAX SALES—PERFECTING TITLE—WHAT NECESSARY.** A person who seeks to perfect his title under tax deeds must have the support of a valid tax title. Hence, the purpose of one, through whom he claims, in taking an assignment of tax sale certificates, is not material because it does not go to the validity of the tax sales. (Cone v. Wood, 223.)

TELEGRAPH COMPANIES.

TELEGRAPH COMPANIES — PUBLIC BUSINESS.—The business of a telegraph or telephone company is public in its nature, and a public interest is impressed thereon to such an extent that no discrimination can be made against persons or corporations in its business of receiving and transmitting messages. (*Inter-Ocean Pub. Co. v. Associated Press*, 184.)

See *Electric Companies*.

TIME.

1. **TIME—COMPUTATION OF.**—In computing time under statutes which require the first day to be excluded and the last included, a month from August 30th begins at the last moment of that day. (*Daley v. Anderson*, 870.)

2. **TIME—COMPUTATION OF.**—A term of months expires on the day of the last month corresponding to the day of the month in which the term began, and if the last month has not so many days, then on the last day of that month. (*Daley v. Anderson*, 870.)

3. **TIME—COMPUTATION OF—"MONTH" AND "CALENDAR MONTH."**—The word "month" as used in a statute means a calendar month, and the term "calendar month" means a month as designated in the calendar, without regard to the number of days it may contain. (*Daley v. Anderson*, 870.)

See *Appeal*, 13, 14.

TRESPASSERS.

See *Negligence*, 4.

TRIAL.

1. **TRIAL—CRIMINAL—ARGUMENT OF COUNSEL.**—In a criminal trial, counsel should confine their arguments to the evidence in the case and not apply abusive epithets to the person on trial, but counsel may draw conclusions from the evidence and characterize the conduct of the accused; hence the saying that the defendant "is a self-confessed thief" is legitimate argument, if it is only a conclusion drawn from the evidence. (*Haupt v. State*, 19.)

2. **TRIAL—CRIMINAL—JURORS.**—An objection which does not affect the whole panel of jurors is not a ground of challenge to the array. (*Commonwealth v. Chance*, 306.)

3. **TRIAL—CRIMINAL—VIEW OF PLACE OF CRIME.**—The right of an accused person to have the jury view the place where the murder was committed rests in the discretion of the court. (*Commonwealth v. Chance*, 306.)

4. **TRIAL, JURY—CHALLENGES.**—Either party may use a challenge upon any juror in the box so long as he has one to use at any time before the jury is finally accepted and sworn, and the waiver of one challenge is not a waiver of any subsequent challenge the party is entitled to. (*State v. Peel*, 529.)

5. **TRIAL—EVIDENCE—REBUTTAL.**—Where, in a criminal case, the prosecution may rest on general presumptions, as that a man can run, until specific evidence is introduced tending to show that the particular case is exceptional, the fact that the prosecution knew that a defense to such presumption would be set up does not affect its duties and compel it to introduce all its evidence as part of its case in chief, but it may wait until the defense is set

up and introduce evidence in rebuttal. (*Commonwealth v. Chance*, 306.)

6. TRIAL—CRIMINAL—VOLUNTARY CONVERSATION OF ACCUSED.—Where an accused has had three conversations with police officers, separated in time, each complete in itself, and in no way referring forward to things still to be said for explanation or qualification, the fact that they all relate to the same subject does not make them one conversation, and the third conversation may properly be excluded as not being voluntary, without the exclusion of the other two. (*Commonwealth v. Chance*, 306.)

7. TRIAL—CONVERSATIONS AS PART OF RES GESTAE.—Where an act can be proved, it does not follow that any and all conversation which happens to be going on at the time of the act can be proved also. (*Commonwealth v. Chance*, 306.)

8. CRIMINAL LAW—CONSTITUTIONAL RIGHTS OF ACCUSED—CONFRONTATION BY WITNESSES.—A person accused of crime has a constitutional right to be present at his trial, to be confronted by the witnesses against him, to meet his accusers face to face, to appear and defend against the accusation preferred against him in person and by counsel, to examine the witnesses, to see into the face of each while testifying against him, to hear the testimony given upon the stand, to see and be seen, and to hear and be heard under reasonable regulations, and he cannot be denied such constitutional rights because of the youth, incapacity, or unwillingness of his accuser to meet him face to face, in the presence of court and jury. Hence, an order of the trial court permitting the prosecuting or other witness to turn her back upon the accused and directing his removal to a distant part of the courtroom while the witness testifies against him, so far that he can neither hear nor see the witness, nor see the jury, because of the distance and intervening obstacles, denies the accused a constitutional right, prevents him from having a fair trial, and vitiates a verdict and judgment of conviction. (*State v. Mannion*, 753.)

9. TRIAL—POWER TO ORDER PERSONAL EXAMINATION.—In a civil action to recover damages for an injury to the person, the court has power, on application of the defendant, to order that the plaintiff be examined by medical experts, appointed by the court, for the purpose of ascertaining the nature, character, and extent of the plaintiff's injuries, and may enforce such order by staying the trial or dismissing the case. (*Lane v. Spokane etc. Ry. Co.*, 821.)

10. TRIAL—INSTRUCTIONS—DEFINITIONS.—In defining matters calling for definition, the court may put before the jury the prerequisites necessary to be proven before a certain condition can exist, provided it is left to the jury to decide the question of fact involved in each prerequisite, and provided it is not told that it must deduce any certain conclusion from the facts if found to be true. (*Butte etc. Min. Co. v. Societe Anonyme etc.*, 505.)

11. TRIAL—DIRECTING VERDICT.—It is proper for the court to direct a verdict for the plaintiff where there is no conflict in the evidence establishing the plaintiff's right of recovery, and there is no evidence tending to support any defense of the defendant. (*Marshall v. Grosse Clothing Co.*, 181.)

See Instructions; New Trial; Witnesses.

TROVER.

TROVER—EFFECT OF JUDGMENT.—Mere rendition of a judgment for the plaintiff in trover does not operate to transfer

to the defendant the title to the goods converted. (*Tolman v. Waite*, 400.)

TRUSTS.

TRUSTS—ACTIVE, WHAT ARE.—If a trustee under a will is authorized to rent lands, invest personalty, pay taxes, repair buildings, and keep them insured, and apply the balance of the proceeds to the care, maintenance, and education of the beneficiaries under the will, the duties imposed upon the trustee are active, and authorize a court of chancery to direct and control the manner of their execution. (*Eldred v. Meek*, 86.)

See Corporations, 5-7; Fraudulent Conveyances, 4, 5.

UNDUE INFLUENCE.

See Gifts, 6.

VENDOR AND PURCHASER.

1. VENDOR AND PURCHASER—BUILDINGS PASS BY SALE.—"Land" includes all buildings of a permanent nature standing thereon, and, as between the vendor and vendee without notice that they belong to some other person, they pass with the land. (*Union Central Life Ins. Co. v. Tillery*, 480.)

2. VENDOR AND PURCHASER—FRAUDULENT REPRESENTATIONS.—A vendor is responsible for fraudulent representations inducing the sale, whether they are made by himself, or by a third person whom he expects to give the vendee false information and he allows the contract to be consummated with knowledge that the vendee is acting on such false information. (*Graham v. Moffett*, 388.)

3. VENDOR AND PURCHASER—VENDOR'S LIEN—FRAUDULENT REPRESENTATIONS.—A vendor is not entitled to affirm a contract whereby he has agreed to take chattels in part payment of the purchase price, and maintain a lien for a deficiency arising from the failure of such chattels to equal their represented value, upon the theory that to that extent the consideration has not been fully paid. (*Graham v. Moffett*, 393.)

4. VENDOR AND PURCHASER—VENDOR'S LIEN—FRAUDULENT REPRESENTATIONS.—If a contract obligates the vendee to pay a given sum for land, and the vendor is subsequently induced by fraud to accept a chattel for the whole or a definitely fixed portion of such purchase price, the vendor may tender back the chattel and enforce a lien for the amount represented by it. (*Graham v. Moffett*, 393.)

5. VENDOR AND PURCHASER—VENDOR'S LIEN—FRAUDULENT REPRESENTATIONS.—A vendor is not entitled to a lien for damages resulting from fraudulent representations as to the value of chattels taken by him in payment for the land conveyed. He is only entitled to recover damages for the fraud, or to a rescission of the contract. (*Graham v. Moffett*, 396.)

VERDICT.

See Appeal, 5, 7, 17; New Trial, 8; Trial, 11.

VICE-PRINCIPAL.

See Master and Servant.

WARRANTS.

See Interest, 13, 14.

WATERWORKS.

See Municipal Corporations, 6, 7; Negligence, 2.

WILLS.

1. **WILLS—CONSTRUCTION—LEGACY, WHEN VESTS.**—A gift by will to a person, if or when he shall attain a certain age, does not vest until that age is attained. (*Eldred v. Meek*, 86.)

2. **WILLS—CONSTRUCTION.—BEQUESTS IN A WILL, VALID IN THEMSELVES, MUST BE REJECTED** with the invalid ones, if the retention of them would defeat the testator's wishes as evidenced by the general scheme adopted, or if manifest injustice would result to the beneficiaries. (*Eldred v. Meek*, 86.)

3. **WILLS—WHAT IS A WILL.**—An instrument dated and commencing, "I agree to will," but intended by the deceased as a will, and which was executed and witnessed as provided for in the case of wills, is a will. (*In re Estate of Longer*, 206.)

4. **WILLS.—NO PARTICULAR FORM** is required for a will, and the words "I agree to will" in an instrument intended to create a testamentary gift mean nothing more than "I do will." (*In re Estate of Longer*, 206.)

5. **WILLS.—WHEN THE ANIMUS TESTANDI** is established, the character of the instrument is fixed. It is a will. (*In re Estate of Longer*, 206.)

6. **WILLS—PROBATE OF.**—An instrument may be entitled to probate as a will though some of its terms are meaningless. (*In re Estate of Longer*, 206.)

7. **WILLS—THE INTENTION OF A TESTATOR IS TO BE ARRIVED AT**, not by considering portions of the will, but by an examination of the entire will, or the system of bequest, giving due consideration to each and every part thereof. (*Eldred v. Meek*, 86.)

8. **WILLS—LEGACIES, WHEN VEST—PERPETUITIES.**—Grandchildren do not take a vested interest under a will directing the payment of personalty and the conveyance of real estate to them upon their attaining the age of twenty-five years, provided that if either grandchild shall die before attaining such age, his share shall be divided among his children, if any, upon their attaining the age of twenty-five years. Such will creates a perpetuity, and is void. (*Eldred v. Meek*, 86.)

9. **WILLS—PERPETUITIES.—DEPENDENT CLAUSES.**—If a will provides for the disposition of an estate upon contingencies which may not happen within the life or lives of persons in being and twenty-one years thereafter, it is void as creating a perpetuity, and all provisions of the will so connected with such void provision as to constitute an entire scheme are illegal and must fall with it. (*Eldred v. Meek*, 86.)

10. **WILLS—RESIDUARY LEGATEE.**—A devise to a son of "all the residue of the testator's real estate and personal property not hereinbefore enumerated, as hereinafter described," is a specific bequest of the subsequently enumerated property, and does not entitle the son to take as residuary legatee the lapsed legacies and property not enumerated in the bequest to him. (*Williams v. McKeand*, 420.)

11. WILLS—EQUITABLE CONVERSION.—If a testator by will masses his realty and personalty in a common fund, and directs that the balances remaining after payment, made of successive legacies of money, shall also be paid over, the will works a conversion of the realty complete at the death of the testator, and from that time the whole estate is assets for the payment of debts, freed, as to any part of it, from the operation of the statute relating to the lien of the decedent's debts. (*Estate of Mustin*, 702.)

12. ASSIGNMENT OF CONTINGENT INTEREST BY ANTENUPTIAL CONTRACT AND REVOKED WILL.—A valid antenuptial contract made to confirm the husband's will, subsequently revoked as his will, by his marriage, operates as an equitable assignment of the property in accordance with the terms of the will, when fairly entered into and expressly sanctioned by the wife, who subsequently becomes the sole heir of the husband. (*Hudnall v. Ham*, 124.)

13. WILLS—REVOCATION OF BY MARRIAGE—ANTENUPTIAL CONTRACT.—A marriage operates, per se, as a revocation of a prior will, although an antenuptial contract was entered into expressly for the purpose of confirming the disposition of the property as made by the will. (*Hudnall v. Ham*, 124.)

14. WILLS—REVOCATION OF BY MARRIAGE—ANTENUPTIAL CONTRACT—IGNORANCE OF LAW AS AFFECTING.—Ignorance by the parties to an antenuptial contract of the law that marriage operates as a revocation of a prior will does not invalidate the contract, nor annul the settlement thereunder. (*Hudnall v. Ham*, 124.)

See Devises.

WITNESSES.

1. WITNESSES.—CONSANGUINITY is not a disqualification of a witness nor proof of his perjury. (*Richardson v. Smart*, 488.)

2. WITNESSES—EXAMINATION OF.—If a witness testifies that the prosecuting witness had paid out money for drinks before the alleged crime was committed, it is competent on cross-examination to test the witness' means of knowledge concerning the money paid out, and to show that the prosecuting witness had paid out and expended all of his money before the crime charged was committed. (*State v. McClellan*, 558.)

3. WITNESSES—EXPLANATION OF IMPRISONMENT OF.—If a prosecuting witness testifies that he has been in jail, he may explain the circumstances of his imprisonment. (*State v. McClellan*, 558.)

4. WITNESSES—CONTRADICTING.—In a criminal case, the prosecution, for the purpose of contradicting a witness, may prove that he testified differently before the grand jury. (*Commonwealth v. Chance*, 306.)

5. WITNESSES—INCRIMINATING TESTIMONY—PRIVILEGE. Where a witness is connected with several distinct transactions which tend to incriminate him, all of which are material to the issues in the case, he does not waive his privilege of refusing to testify as to some of the incriminating transactions, by consenting to testify as to others. But he waives his privilege as to such transactions so far as the inquiry as to them is within the proper limits of a cross-examination. (*Evans v. O'Connor*, 816.)

6. WITNESSES—PRIVILEGED COMMUNICATIONS.—A witness cannot refuse to answer a material question in relation to a material conversation on the ground that, having been given and

received as a Mason, it is a privileged communication. (*Owens v. Frank*, 932.)

7. WITNESSES—PRIVILEGED COMMUNICATIONS—MEMBERS OF SECRET SOCIETIES.—However binding an obligation may be, as between members of the same society, secret or otherwise, not to divulge to others that which may be confidentially communicated to them, such an obligation must be understood to be subject to the laws of the country, and therefore it cannot be said that such obligation is violated when the disclosure is compelled in a court of justice, in the course of the administration of the laws. (*Owens v. Frank*, 932.)

8. WITNESSES—PHYSICIANS—PRIVILEGED COMMUNICATIONS—RIGHT TO EXCLUSION OF TESTIMONY WITHOUT COMMENT.—In an action for personal injuries physicians who examined the plaintiff, at his instance, in a professional capacity to determine the extent of his injuries should not be permitted, against the plaintiff's objection, to testify as to any information acquired on such examination; and the plaintiff is entitled to have such testimony excluded without its being made the subject of comment before the jury. (*Lane v. Spokane etc. Ry. Co.*, 821.)

9. WITNESSES—OPINIONS OF NONEXPERTS AS TO MENTAL CONDITION.—The opinion of a layman or nonexpert as to the mental condition of a person accused of crime, based in part upon facts not derived from his own observation, is incompetent and inadmissible in evidence. (*State v. Peel*, 529.)

10. WITNESSES—OPINION OF NONEXPERT AS TO MENTAL CONDITION.—A nonexpert witness expressing an opinion as evidence of the mental condition of a person accused of crime must be confined to, and can only speak as of, the time of his observation, and he cannot be permitted to express an opinion as to the temporary or permanent nature of the disease producing such condition in the accused. (*State v. Peel*, 529.)

11. WITNESSES—OPINIONS OF NONEXPERTS AS TO THE MENTAL CONDITION OF A PERSON ACCUSED OF CRIME ARE ADMISSIBLE IN EVIDENCE WHEN BASED WHOLLY UPON THEIR OWN OBSERVATIONS. (*State v. Peel*, 529.)

12. WITNESSES—OPINION BY NONEXPERT ON INSANITY. On a trial for homicide a nonexpert witness who has given his opinion as to the sanity of the accused may properly be asked on cross-examination what he means by "insanity" and "unsoundness of mind," if there is no attempt to compel him to give a technical definition or to confuse him with technical distinctions. (*State v. Peel*, 529.)

13. WITNESSES—EXPERTS—HYPOTHETICAL QUESTION.—If, on a trial for homicide, insanity is pleaded as a defense, and the prosecution has shown that an unfriendly feeling has existed for some time between the accused and the deceased prior to the killing, the following hypothetical question may be properly asked and answered by an expert witness: "Where a party has a grudge against another and has avowed it, and had in a rational way conversed with lawyers and judges about it, and he should go from them and lie in wait for his enemy or remain in the vicinity until he appeared, and then should go from where he was, draw a revolver, and shoot him, saying, 'Take that,' or words to that effect, and, having shot his enemy, should turn around and say, 'I will go to the jail and give myself up,' and within twenty minutes or half an hour should talk the matter over in a reasonable manner, apparently as conscious as ever he had been immediately before the shooting, what would you say as to the fact of his consciousness

and knowledge of right and wrong and knowledge of the unlawfulness of his act at the time of the shooting?" (State v. Peel, 529.)

14. WITNESSES — EXPERTS — ASSUMPTION OF FACTS PROVED.—The prosecution, in putting hypothetical questions to an expert witness on a trial for homicide, has a right to assume as established, for the time being, all the facts in evidence tending to support its theory of the case, and it is for the jury to say, after considering all the evidence introduced by both sides, whether the facts thus assumed as established for the time being, are really established, and whether the opinion of the witness is worthy of consideration. (State v. Peel, 529.)

15. WITNESSES—EXPERTS—INSANITY.—A question as to the insanity of the accused on a criminal trial put to an expert need not embrace all the elements of the law of insanity, but may limit the inquiry to the degree of intelligence possessed by the accused under the circumstances of the particular act. (State v. Peel, 529.)

See Appeal, 4; Instructions, 4; Statutes, 2; Trial, 3, 9.



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